

# FEEDING THE RIGHT WOLF: A NIEBUHRIAN PERSPECTIVE ON THE OPPORTUNITIES AND LIMITS OF MINDFUL CORE CONCERNS DISPUTE RESOLUTION

Jeffrey W. Stempel\*©

I.	INTRODUCTION .....	473	R
II.	NEGOTIATING IN A FOREST FILLED WITH BAD WOLVES: USING MINDFULNESS TO DETERMINE THE LIMITS OF NEGOTIATION ....	476	R
A.	<i>The Range of Negotiation Respondents</i> .....	476	R
B.	<i>The Benefits of a Niebuhrian Perspective in Negotiation</i> ..	478	R
1.	<i>Remembering Reinhold Niebuhr</i> .....	478	R
2.	<i>Niebuhr and Negotiation</i> .....	484	R
3.	<i>Applying the Niebuhrian Approach to a Classic Case of Failed Negotiation</i> .....	488	R
4.	<i>The Niebuhrian Perspective and Ordinary Dispute Resolution</i> .....	495	R
5.	<i>Fitting the Focus to the Fuss</i> .....	499	R
III.	THE RICHNESS OF THE RISKIN METHOD: ADDITIONAL ASPECTS AND AN IMPLICIT AGENDA FOR FURTHER WORK .....	504	R
A.	<i>Slowing down to Speed up: The Potential Gains of Mindfulness at the Outset</i> .....	505	R
B.	<i>Maximizing Mindfulness in Formal Dispute Resolution: The Role of the Lawyer</i> .....	505	R
C.	<i>Mindfulness, Core Concerns, and Entity Disputants</i> .....	506	R
D.	<i>Reconciling Mindfulness and the Lawyer’s Adversarial Role</i> .....	507	R
E.	<i>Ethics, Incentives, and Mindfulness</i> .....	509	R
F.	<i>“A Sense of Where You Are”: Situation Sense and Dispute Resolution</i> .....	509	R
IV.	CONCLUSION .....	510	R

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\* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Jean Sternlight and, of course, Len Riskin for ideas on this issue and to Doris and Ted Lee, Ann McGinley, Jim Rogers, Mike and Sonja Saltman, and John White for continuing support. Thanks also to Jeanne Price, Annette Mann, and Shannon Rowe for help with research and processing. © 2009 Jeffrey W. Stempel

## I. INTRODUCTION

Professor Leonard Riskin has once again helped launch new inquiry into a previously under-examined aspect of dispute resolution.<sup>1</sup> Building on the core concerns identified by Fisher and Shapiro,<sup>2</sup> and work on interest-based bargaining and win-win dispute resolution outcomes,<sup>3</sup> Professor Riskin has again

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<sup>1</sup> Professor Riskin was a pioneer in making dispute resolution part of the modern law school curriculum. See generally LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* (4th ed. 2009) (1987); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982). Later, his article, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) [hereinafter Riskin, *Grid*], skillfully gave form and content to a festering but incompletely explored concern regarding the mediator styles and roles along with the place of substantive law in mediation and also spurred considerable commentary. Riskin's *Grid* sparked considerable commentary and reflection regarding the ethics and efficacy of different mediation styles. See, e.g., John Lande, *How Will Lawyering and Mediation Practices Transform One Another?*, 24 FLA. ST. U. L. REV. 839, 871 (1997) (noting divergent styles and their frequent blending); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1882 n.58 (1997) (noting emergence of facilitative-evaluative debate regarding mediation styles mapped in Riskin, *Grid*, *supra*); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 248 (2000) (advocating a flexible combination of approaches as an optimal, situation-specific mediator approach); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 987-95 (1997) (defending essentially facilitative character of mediation but acknowledging evaluative components of mediation); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707-10 (1997); Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 506 (1997) (tending to defend evaluative behavior by mediators in apt situations); see generally James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991) (noting the facilitative-evaluative divide in the field); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 19-20 (1986) (describing facilitative and evaluative techniques by mediators). For an updated look at Professor Riskin's thinking regarding mediation styles, see Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

<sup>2</sup> See generally ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

<sup>3</sup> The seminal work in this area is almost certainly ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991) (1981), although there were prior significant theoretical and practical explorations of what was then termed "alternative" dispute resolution. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (empirical study suggesting that divorce litigants seek to resolve marital dissolution disputes informally but within a framework of knowledge regarding the range of likely outcomes established under substantive law); Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

The meeting at which Professor Sander spoke was more popularly known as the "Pound Conference" after Roscoe Pound, who gave his famous address of that name at the 1906 ABA Annual Meeting in St. Paul. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906) & 57 A.B.A. J. 348 (1971) (abridged version). Then Chief Justice Warren Burger, a Minnesota native, was capitalizing on Pound's theme and its location with a conference designed to encourage ADR that had, for better or worse, a distinctly anti-litigation tone. See generally, e.g., Laura Nader, *Commentary*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE*

spurred examination of two key issues in dispute resolution. First, what should negotiators (both principals and agents) and, by implication mediators, consider and do regarding the psychological and emotional makeup of the disputants?<sup>4</sup> Second, what mind-set should the parties, their counsel, and mediators adopt to best accomplish preferred dispute resolution practices? Professor Riskin answers the question effectively but (by his own admission) in a general, exploratory manner designed to launch further examination rather than provide the last word. It would hardly be surprising if scholars a decade hence are continuing to address the Riskin-generated questions in this area just as they did the question of apt mediator styles.<sup>5</sup>

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(A. Leo Levin & Russell Wheeler eds., 1979) (criticizing and contesting crisis rhetoric about court caseloads and the seeming rush to streamline proceedings or remove disputes from litigation); Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231 (1976). *But see* A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 137-40 (1976). In hindsight, one may view the conference as a kickoff in a campaign to reduce not only the transaction costs of litigation, but also assertions of rights by claimants. *See* Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156-58 (1993); *see generally* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982) (urging use of alternative dispute resolution); Raymond J. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (1983) (advocating use of court-annexed arbitration as means of reducing court dockets while allowing claimants meaningful right to be heard).

In what might be termed the post-Fisher & Ury world, dispute resolution scholarship has moved from procedural attempts to improve judicial efficiency or lighten court caseloads, to more interdisciplinary explorations regarding effective negotiation and non-adjudicative settlement of disputes. *See* ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, (1999); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, (2001); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, (2000); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, (1997). *But see* G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2d ed. 2006) (which references dispute resolution scholarship but presents itself as more of a how-to manual for negotiation). The thirty-year trend of scholarship supporting dispute resolution is not uniformly supportive of all ADR initiatives. *See, e.g.*, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 528-29 (1986) (expressing concern over removal of cases from adjudicative system due to settlement and ADR); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982) (criticizing active judicial pursuit of settlement as inconsistent with adjudicatory role of the bench); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 239-41 (1995); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 696-97 (1996) (noting potential unfairness of compelled arbitration); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 671 (2001) (arguing that mandatory arbitration violates the Seventh Amendment right to jury trial); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 37-53 (2000).

<sup>4</sup> *See generally* Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008).

<sup>5</sup> *See, e.g.*, sources cited *supra* note 1 (noting articles commenting on Riskin, *Grid*.) Professor Riskin's article in this symposium issue is part of his larger project regarding the benefits

In brief, Professor Riskin advocates that all participants in dispute resolution adequately address the five core concerns of the disputants: (1) autonomy; (2) affiliation; (3) appreciation; (4) status; and (5) role.<sup>6</sup> He explains and applies the concept, using the rich hypothetical of Jack and Phil's boiler business<sup>7</sup> (as well as the wonderful real world anecdote about former President Bill Clinton and House Speaker Newt Gingrich).<sup>8</sup> To achieve this goal, Professor Riskin advocates mindfulness on the part of the participants, defining the term and illustrating its application.<sup>9</sup>

As a basic blueprint for improved dispute resolution, the Riskin methodology is hard to fault. If there were greater mindfulness and greater attention to the five core concerns, there would undoubtedly be better negotiation and mediation outcomes. However, operationalizing this improved state of dispute resolution in the real world promises to remain elusive. The mindfulness-core concerns methodology holds great promise, but also holds some potential peril in that insufficiently mindful negotiators and mediators may unwisely attempt to use this approach with situations or disputants who are unduly resistant, or even impervious, to its effective use. In this Comment, I offer a few observations regarding both the promise and the difficulties faced in using mindful core concerns dispute resolution.

In Part II, I focus on the difficulties faced by mindful negotiators and mediators when confronted with disputants who are too adversarial, selfish, unrealistic, or unresponsive to overtures for interest-based bargaining—even after skilled attempts to neutralize whatever negative emotions may be fueling their counterproductive behavior. In making these assessments and suggestions, I rely significantly on the work of Reinhold Niebuhr. Appreciation of Niebuhr's insights can assist mindful negotiation by helping the negotiator to distinguish those situations amenable to the cooperative core concerns approach from those where negotiation may be futile, or more likely to succeed through more direct methods less solicitous of an uncooperative opposing party. A Niebuhrian perspective counsels negotiators to deploy the Riskin

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of mindfulness in dispute resolution and lawyering generally. *See generally, e.g.*, Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79 (2004); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

The primary duality regarding mediator styles is the distinction between evaluative and facilitative mediators. The former are willing to assess the respective strengths of different disputant positions as measured against likely outcomes if the dispute is litigated. The latter group eschews evaluation and attempts to facilitate resolution of the matter according to the parties' goals without reference to the range of likely litigation outcomes. Professor Riskin helped to clarify this duality and observed that mediators frequently exhibit both styles. Riskin, *Grid*, *supra* note 1.

<sup>6</sup> Leonard L. Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289, text accompanying notes 1-8 & note 36 (2010).

<sup>7</sup> *See id.* at text accompanying note 36.

<sup>8</sup> *See id.* at text accompanying notes 1-8 (describing how House Speaker Newt Gingrich felt shunned by President Bill Clinton regarding travel arrangements and how this may have contributed to a Gingrich-Clinton impasse over the federal budget that took place shortly thereafter).

<sup>9</sup> *See id.* at text accompanying notes 51-105.

approach where it is most likely to succeed, and to eschew or modify the approach when it is unlikely to be effective. In Part III, I suggest some further directions for scholarship and practice applying the Riskin-Fisher-Shapiro-Ury fusion of interest-based bargaining, core concerns, and mindfulness suppressing the adverse impact of negative emotions.

## II. NEGOTIATING IN A FOREST FILLED WITH BAD WOLVES: USING MINDFULNESS TO DETERMINE THE LIMITS OF NEGOTIATION

### A. *The Range of Negotiation Respondents*

The template for negotiation advocated by Professor Riskin assumes that two or more disputants, even if acting angrily, petulantly, cruelly, or in some other counter-productive fashion, are acting in good faith. The assumption that disputants generally seek to resolve matters in good faith, even if impeded by negative emotion, appears to be empirically correct.<sup>10</sup> Even if the assumption were incorrect, a dispute resolution approach emphasizing an attempt to maximize the respective interests of the disputants must assume good faith participation. Without this, it is hard-to-impossible to correctly identify interests, available options, and potential zones of agreements.

If disputants are not acting in good faith, the enterprise is likely to be pointless. Either no agreement will be reached because of lack of accommodation or there will be an agreement that leaves at least one party feeling dissatisfied or even defrauded, which will likely lead to negative ramifications, including future disputes or revisiting of the initial dispute (e.g., a motion to set aside a settlement; a motion to modify a settlement). In addition, a disputant negotiating in bad faith is more likely to break an agreement if not sufficiently to his advantage. Good faith is akin to candor. Successful negotiation is almost impossible if disputants do not give honest reactions and make honest statements as to their concerns, goals, and interests. Without candor and good faith, parties are forced to guess at the interests of the other parties, which in

<sup>10</sup> For example, even for a party that has suffered horribly at the hands of another party, it appears that seeking negotiated or mediated resolution is not fruitless. This also probably explains in part the power of an apology in rectifying a dispute. Victims appear to seek reconciliation rather than revenge in that they accept apologies rather than insisting on more punitive measures. See Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 MED. Q. 265 (2000) (finding that apology is an effective means of dispute resolution); Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 59 (2005) (concluding that apology is an effective dispute resolution device in many cases of medical error); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1265 (2006) (arguing for effectiveness of court-ordered apologies, which may be coercive but are in my view not punitive); Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 292 (2001) (notwithstanding some criticisms of efficacy of apology, "incorporating apology into the resolution of legal disputes nonetheless has merit in light of the benefits to both victims, wrongdoers, and their communities"). But see Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371, 372 (2006) (criticizing the popularity of insincere, superficial apology as a response to bad behavior, and arguing that victims are unimpressed by many apologies, and noting that "[b]ad people are, of course, often quick studies of social trends that can be used to their advantage").

turn makes accommodation of those interests difficult if not impossible. We at least must assume that, for the most part, disputants are genuinely concerned about achieving a fair resolution of their interest-based concerns rather than taking unfair advantage of others.

Most people want to be fair and are at least substantively open to negotiated settlement.<sup>11</sup> However, even those acting in good faith sometimes do bad or counterproductive things. In addition, there remains a significant subgroup that, consciously or unconsciously, seeks to take advantage of others in inappropriate ways. Thus, effective negotiation aided by mindfulness can help put aside negative emotions and help the majority of disputants to see beyond their initial, often over-heated, emotional, or adversarial assessment of a situation. But mindfulness has another use: helping negotiators and mediators realize when a different approach may be required, or where negotiation or mediation is futile and must yield to adjudication or a similarly coercive resolution, such as arbitration or a legislative-administrative determination.

Most people exhibit a range of good and bad behavior as well as a range of positive and negative emotions. Professor Riskin captures this point brilliantly in his use of the Cherokee homily, in which a grandfather explains the

<sup>11</sup> At the risk of creating yet another set of categories, I find it useful to distinguish between “substantive” and “procedural” openness to dispute resolution. A disputant is substantively open to negotiated settlement as long as the disputant does not hold the view that litigation to conclusion is the best solution to the controversy, and that no negotiated settlement can improve the litigation result. By contrast, a disputant is procedurally closed to negotiated resolution when he is unable to properly assess the situation due to distorting influences that are not strictly relevant to the legal merits of the dispute.

For example, Phil and Jack (*see* Riskin, *supra* note 6, at text accompanying note 36) may not be procedurally open to the full range of negotiated settlement options because they are in the grip of strong negative emotions, even though both are substantively open to settlement as neither wants protracted litigation nor continued festering of the problems between them. In this sense, mindfulness and focus on core concerns appear to be tools best designed for removing the procedural or psychological impediments to negotiated resolution rather than overcoming the more substantive impediments that can result when the parties have opposing assessments of the merits of the controversy, the applicable law to be applied in the absence of settlement, or the certainty of the legal default rule that will be imposed. *See, e.g.*, Robert H. Mnookin, *When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 U. COLO. L. REV. 1077, 1107 (2003) (“For too long, negotiation imperialists have implicitly assumed that negotiation always makes sense. This is, of course, nonsense. Such a conclusion would require that the expected net benefits of negotiation are always greater than the expected net benefits of any alternative form of dispute resolution[, but n]egotiation is not without costs . . . .”); *see also* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 864-66 (2008) (suggesting that court-ordered mediation is less effective than it could be due to procedural failure to take full advantage of greater flexibility and potential for creativity afforded by mediation as compared to adjudication).

I realize this nomenclature is imperfect. The differentiated barriers to settlement I am discussing could also be characterized as a disputant’s “rational” openness to negotiated resolution or its “psychological” or “emotional” openness to negotiated settlement. In addition, as Professor Riskin’s article implicitly illustrates, emotional barriers to negotiation (e.g., anger over a business partner’s lack of appreciation) can harden into a substantive barrier to negotiation (e.g., the belief that a court decision will provide needed recognition and unwillingness to accept the less official and formal recognition of belated appreciation by the business partner). What begins as Jack’s anger toward Phil can become an ossified view of the legal merits of their dispute.

range of human behavior and emotions through use of the good wolf-bad wolf metaphor.<sup>12</sup> He explains that within him two wolves are fighting. The good wolf embodies “joy, peace, love, hope, serenity, humility, kindness, benevolence, empathy, generosity, truth, compassion, and faith” while the bad wolf embodies “anger, envy, sorrow, regret, greed, arrogance, self-pity, guilt, resentment, inferiority, lies, false pride, superiority, and ego.”<sup>13</sup> The grandson asks which of the two wolves will win the battle for the grandfather’s soul, to which he sagely replies, “The one you feed.”<sup>14</sup>

## B. *The Benefits of a Niebuhrian Perspective in Negotiation*

### 1. *Remembering Reinhold Niebuhr*

This notion of both good and bad in humans runs throughout the work of Reinhold Niebuhr. Niebuhr “was an immensely influential theologian, moral philosopher, and political theorist who wrote prolifically during the middle third of the twentieth century.”<sup>15</sup> He authored twenty-one books and “hundreds of articles, essays, columns, and lectures.”<sup>16</sup> Surely, Niebuhr is also one of the most influential theological-political writers impacting legal scholarship, hav-

<sup>12</sup> Riskin, *supra* note 6, at text accompanying note 117.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Amy R. Mashburn, *Pragmatism and Paradox: Reinhold Niebuhr’s Critical Social Ethic and the Regulation of Lawyers*, 6 GEO. J. LEGAL ETHICS 737, 744 (1993) [hereinafter Mashburn, *Paradox*]; accord Arthur Schlesinger, Jr., *Reinhold Niebuhr’s Role in American Political Thought and Life*, in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT 125, 133-36 (Charles W. Kegley & Robert W. Bretail eds., Paperbacks Ed. 1961); Seth Yaffo, *Beware the Dotted Line: Foreclosure Rescue Fraud in Maryland and the Growing Effort to Combat It*, 37 U. BALT. L. REV. 113, 113 n.1 (2007) (noting that Niebuhr “was one of the twentieth century’s leading political thinkers”); see Amy R. Mashburn, *Pragmatic Professionalism: An Exercise in Applied Ethics*, 2 J. INST. STUDY OF LEGAL ETHICS 101, 102 (1999) [hereinafter Mashburn, *Professionalism*] (noting that Niebuhr’s “influence has been enormous and few who have encountered his ideas have been untouched by their power and provocativeness. The longevity of his thought is attributable, I believe, to stunning insights into human nature and a persuasive practicality.”); see also Chuck D. Barlow, *Why the Christian Right Must Protect the Environment: Theocentricity in the Political Workplace*, 23 B.C. ENVTL. AFF. L. REV. 781, 808 (1996) (invoking Niebuhr’s theological writings as relevant to setting environmental policy); John D. Carlson, *God, War, and the Secular: Varieties of Religious and Ethical Traditions*, 7 BARRY L. REV. 1, 17-20 (2006) (invoking Niebuhr’s writing as part of argument regarding apt consideration of religious norms in making decisions regarding war); Tassaduq Hussain Jillani, *Democracy and Islam: An Odyssey in Braving the Twenty-First Century*, 2006 BYU. L. REV. 727, 736 (2006) (referring to Niebuhr’s writing on democracy, in particular his famous quotation that “[m]an’s capacity for justice makes democracy possible; but man’s inclination to injustice makes democracy necessary”).

<sup>16</sup> Mashburn, *Paradox*, *supra* note 15, at 744 n.25 (citing D.B. ROBERTSON, REINHOLD NIEBUHR’S WORKS: A BIBLIOGRAPHY (1983)). Among Niebuhr’s best known works are MAN’S NATURE AND HIS COMMUNITIES (1965) [hereinafter NIEBUHR, MAN’S NATURE AND HIS COMMUNITIES]; THE STRUCTURE OF NATIONS AND EMPIRES (1959); THE IRONY OF AMERICAN HISTORY (1952); PIOUS AND SECULAR AMERICA (1958) [hereinafter NIEBUHR, PIOUS AND SECULAR AMERICA]; THE NATURE AND DESTINY OF MAN (1949) [hereinafter NIEBUHR, THE NATURE AND DESTINY OF MAN]; and MORAL MAN AND IMMORAL SOCIETY (1960) [hereinafter NIEBUHR, MORAL MAN AND IMMORAL SOCIETY].

ing been cited in nearly 300 law review articles.<sup>17</sup> In fact, he remains sufficiently prominent that:

When a social commentator complains about a missing sense of complexity and ambiguity, he or she often is said to have raised a “Niebuhrian” point. The reference is to Reinhold Niebuhr, the American Protestant theologian, social theorist, journalist, and political activist. In a public career spanning from the Great Depression to the Vietnam War, Niebuhr earned a reputation as a biting critic of claims to final virtue or knowledge in the social and political spheres.<sup>18</sup>

Although advocating at least a dose of Niebuhrian realism in dispute resolution, I am not using the term in quite the same critical manner suggested in the above passage, and I certainly am not accusing Professor Riskin of missing

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<sup>17</sup> See Jonathon A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2059 (1993) (book review) (referring to Niebuhr as “widely influential”).

As of June 15, 2009, Niebuhr was in 295 law review articles. By comparison, the highly regarded theologian and public intellectual Paul Tillich is considerably less cited (228 times). More modern popular writers touching on religion will probably never catch either of them. For example, University of North Carolina religion professor Bart D. Ehrman has thus far been cited in only a handful (literally) of articles despite the popularity of his books such as *JESUS, INTERRUPTED* (2009), *MISQUOTING JESUS* (2005), *GOD’S PROBLEM* (2008), and *THE APOSTOLIC FATHERS* (2003), which regularly make best seller lists. (Although Ehrman is a self-described agnostic, his writing is clearly that of a historical theologian and he is, after all, a professor of religion). Even Rick Warren, author of the phenomenally popular *THE PURPOSE DRIVEN LIFE* (2002) and a speaker at the Obama Inaugural (to the consternation of many civil libertarians due to Warren’s opposition to gay rights) is cited in only 27 articles.

In his time, Niebuhr was a public intellectual of rather high profile. He was on the cover of the March 8, 1948 issue of *TIME* magazine, perhaps with the fittingly realist/cynical caption, “Man’s story is not a success story.” Mashburn, *Paradox, supra* note 15, at 776 n.258.

While never quite becoming household names, Paul Tillich, Dietrich Bonhoeffer, Karl Barth, Reinhold Niebuhr, H. Richard Niebuhr [Reinhold’s brother], and others were major intellectual figures with a sizable public following. Theology and ethics were taken seriously. As these major figures passed from the scene, there has been a sense that their successors are somehow not of the same stature.

William McKinney, *Americans and Religions in the Twenty-First Century, Mainline Protestantism 2000*, 558 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 60 (1998).

Perhaps even more interesting is that Niebuhr appears to have staying power. His work is cited in law review articles in increasing amounts from the 1980s (17 articles) to the 1990s (114 articles) and he is on pace to equal or exceed that degree of influence in the legal literature during the first decade of the twenty-first century. Professor Mashburn described Niebuhr as having a “renaissance of sorts” during the early 1990s, Mashburn, *Paradox, supra* note 15, at 744 (footnote omitted), but it appears, fifteen years after Mashburn wrote, that Niebuhr enjoys steady influence, although he was less present in the legal literature during his living years (1892-1971) and immediately after his death; however, this appearance may stem from the smaller searchable electronic database available for those years. By any measure, Niebuhr was influential.

<sup>18</sup> Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1568 (1995) (citing JOHN PATRICK DIGGINS, *THE RISE AND FALL OF THE AMERICAN LEFT* 19 (1992), as outlining a “‘Niebuhrian’ approach critical of overconfidence” on the part of both the left and right in American politics); see also Richard Wightman Fox, *Lasching Liberalism*, 109 CHRISTIAN CENTURY 277, 281 (1992) (describing historian Christopher Lasch’s critique of political optimism as “Niebuhrian” in the book CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* (1991)).

the complexity and ambiguity presented by disputes. On the contrary, mindfulness and attention to core concerns makes dispute resolution considerably more complex than the “let’s split the difference,” “give me your bottom line” or “what will it take to make this go away” approach that characterized much traditional dispute resolution in the pre-ADR era and continues to exert a surprising pull in practice.

Instead, I am using “Niebuhrian” in the sense that I believe it is important when deploying mindfulness, core concerns cognizance, interest-based bargaining, or any other form of dispute resolution, to appreciate the limits and inconsistencies of the disputants themselves. Sometimes the basic human problem of self-interest will require redoubled efforts or make meaningful negotiation futile. In particular, some disputants are simply unwilling to engage in good faith negotiation. The mindful negotiator or mediator must be able to identify these disputants and realize when further negotiation is futile.

Applied to mindful dispute resolution, a Niebuhrian perspective appreciates that some disputants present greater, and perhaps even intractable obstacles to good faith resolution of disputes than others. Like the economic juggernauts of which Niebuhr wrote, they will be compelled to be reasonable only through the coercive power of adjudication, legislation, or administrative enforcement. Accordingly, the truly mindful negotiator or mediator will recognize and differentiate between the situations in which a reasonable disputant is rendered temporarily unreasonable due to negative emotions or other factors, and the situations in which a disputant is unwilling to bargain in good faith (a Niebuhrian “child of darkness” discussed below).<sup>19</sup>

In addition, the mindful dispute resolver will recognize situations in which a child-of-darkness disputant is attempting to mask himself as a reasonable disputant acting in good faith and will resist or avoid manipulation by the “bad” disputant. Professor Riskin certainly recognizes that mindful core concerns negotiation will not always work due to an intractable adversarial approach in some disputants.<sup>20</sup> Additionally, negotiators face a challenge when a disputant does not appear adversarial, but is, in fact, posturing and not participating in good faith negotiation. In such circumstances, the bad faith disputant may be using negotiations only as a ploy to buy time, extract information, or posture so as not to be criticized by a tribunal for failure to negotiate.<sup>21</sup>

<sup>19</sup> See *infra* notes 38-42 and accompanying text.

<sup>20</sup> Professor Riskin commented upon this in the public presentation of his paper at the Boyd School of Law, March 27, 2009, concluding (at least as I understood his comments) that it was largely futile to continue to attempt to explore interest-based, fair resolution of a dispute if one of the parties was consistently adversarial and unwilling to collaborate in good faith. Leonard L. Riskin, Address at the William S. Boyd School of Law, University of Nevada, Las Vegas (Mar. 27, 2009).

<sup>21</sup> Although he did not mention this type of bad faith disputant masquerading as a good faith disputant, I am sure Professor Riskin recognizes and appreciates this type of disputant. My concern is that many or even most negotiators may not have this recognition and appreciation, particularly if they approach mindfulness and problem-solving dispute resolution with too naïve an attitude regarding the participants. My suggestion of taking a Niebuhrian perspective is not intended to stifle enthusiasm for Riskin’s promising methodology, but rather to make its practitioners alert to the potential for its abuse in the hands of some disputants.

I should also note that although I see the mindfulness methodology as promising for both negotiators and mediators, their respective roles call for a different approach. For the

Some will undoubtedly view being a Niebuhrian as being a naysayer. But Niebuhr's own life suggests he was a progressive optimist, albeit eventually a restrained and realistic optimist. After study at Eden Theological Seminary and Yale Divinity School, he was a pastor in Detroit for thirteen years before joining the faculty of Union Theological Seminary in New York. There, he held the title of Professor of Christian Ethics,<sup>22</sup> even though some questioned the depth of his religious commitment.<sup>23</sup>

As a young pastor in Detroit (1915-28), he attacked Henry Ford's labor policies and worked in pacifist organizations. During the Great Depression, he was a tireless activist for left-wing causes, twice running for office as a Socialist. After rejecting both pacifism and Marxism, Niebuhr worked vigorously in 1939 and 1940 to strengthen sentiment against Nazi Germany, and later in the Cold War to organize liberal opposition to Communism. In his waning years, he lent his support to protests against the Vietnam [W]ar.

Niebuhr was distinctive, however, in that he set political activism in the context of an increasingly sophisticated "realism" about the nature of humans and society. . . . [He leveled] a withering assault against various strains of political and religious liberalism, which Niebuhr claimed had far too much confidence in the possibility of improving society through education, through scientific and empirical analysis, or through "appeals to love, justice, goodwill and brotherhood." Due to his own struggles with Henry Ford, Niebuhr became convinced that self-interest and the will to power were pervasive in human social behavior, especially the behavior of social groups. Socializing private property was necessary, he argued, precisely

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negotiator representing oneself or a client, it is more than permissible to decide, even at a fairly early stage of negotiation, that another party is not acting in good faith, thereby freeing the negotiator to employ more traditional bargaining strategies other than core concerns, interest-based bargaining—or even to terminate further negotiation efforts. To put it simply, a negotiator is relatively free to decide that another party or its agent is evil, bad, duplicitous, acting in bad faith, etc. At least there is no ethical constraint on the negotiator in this regard, although a negotiator who is too quick to adopt such a view probably deserves self or clients in most circumstances.

By contrast, mediators must be slower to make a negative judgment about any participants because of the mediator's commitment to neutrality. Some would even argue that the mediator may never judge a participant or take asymmetric actions in a mediation. *See infra* notes 90-93 and accompanying text (discussing facilitative, evaluative, and eclectic mediation). In my view, however, neutrality does not mean undue credulity. A mediator is free to eventually determine when a party or its agent acts in bad faith and take appropriate action. However, the mediator must be slower to come to this view than a negotiator, and logically must have stronger evidence of disputant bad faith or other misconduct.

<sup>22</sup> See author's biographical note in REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* (1960).

<sup>23</sup> See Mashburn, *Paradox*, *supra* note 15, at 745 (noting that Niebuhr "considered himself a teacher of 'Christian Social Ethics' rather than a theologian. His theology existed pragmatically to serve his ethic, and not vice versa.") (footnotes omitted) (citing sources, including Reinhold Niebuhr, *Intellectual Autobiography of Reinhold Niebuhr*, in NIEBUHR: HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT 1 (Charles W. Kegley & Robert W. Bretail eds., 1956)). Mashburn also notes that a biography of Niebuhr by Richard Fox "can be read as implying" that Niebuhr's belief in God was "manufactured or purely instrumental." HARRY J. AUSMUS, *THE PRAGMATIC GOD: ON THE NIHILISM OF REINHOLD NIEBUHR* 43-44 (1990); *see also* RICHARD WIGHTMAN FOX, *REINHOLD NIEBUHR: A BIOGRAPHY* 20, 215 (1985).

because economic power would give way only to “coercion,” not to reason or moralizing.<sup>24</sup>

Some saw Niebuhr as cynical regarding human nature.<sup>25</sup> He cautioned against holding either too optimistic or pessimistic a view of the nature of humankind,<sup>26</sup> suggesting that people held within them both noble and evil characteristics. As a result, Niebuhr warned that it would be unwise to be overly optimistic regarding society or politics just as it would be foolish to proceed consistently assuming and attempting to suppress the worst in people.<sup>27</sup> “Niebuhr was preoccupied with achieving a proper understanding of the individual and collective capabilities, illusions, self-deceptions, limitations, and potential of human beings. . . . [His] moral philosophy is founded on an explicit, systematic, and comprehensive view of human nature.”<sup>28</sup>

One author described Niebuhr’s work as seeming “to crystallize around one theme: an exposition of innate human limitations and potential and the

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<sup>24</sup> Berg, *supra* note 18, at 1583-84 (footnotes omitted) (quoting Reinhold Niebuhr, *The Blindness of Liberalism*, RADICAL RELIGION 23 (Autumn 1936)). *But see* Daniel D. Williams, *Niebuhr and Liberalism*, in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT, *supra* note 15, at 193, 195-97 (accusing Niebuhr of overstating the naivety or utopian attitudes of political reformers).

Berg also notes that the “source of Niebuhr’s ‘realism,’ however, soon turned more theological” and that he “began to locate the roots of society’s evils in the self rather than in particular social conditions, thus casting doubt on the idea that any political program could be an ultimate answer.” Berg, *supra* note 18, at 1584 (citing REINHOLD NIEBUHR, REFLECTIONS ON THE END OF AN ERA 243-44 (1934) and quoting Niebuhr’s warning that Communism can lead to “new and stronger centres of political power which will be new occasions for and temptations to injustice”). I perhaps read Niebuhr as more consistent than does Professor Berg in that it appears that Niebuhr was concerned about the potential dangers of both excessive private and excessive public power, both fueled by the self-interest inherent in the constituent natural persons who operate artificial persons such as governments and corporations. Niebuhr briefly advocated more collective ownership as a means of controlling private accumulations of power but came to see this as a solution that might be worse than the problem it attempted to solve. His overall view, however, remained one of realism, or perhaps even healthy skepticism or cynicism regarding human nature and its malleability to higher ideas. *Cf.* Berg, *supra* note 18, at 1602-08 (warning of “The Danger of Secular Cynicism” and finding support in Niebuhr’s work).

<sup>25</sup> *See supra* notes 18-19, 23 and accompanying text. Others, including me, see Niebuhr more as a pragmatist. Berg, *supra* note 18, at 1591-93 (characterizing Niebuhr as a pragmatist and concluding that “Niebuhr ultimately settled on a form of pragmatic liberalism ‘characterized by a rejection of all ideologically consistent political schemes’”) (quoting RONALD H. STONE, PROFESSOR REINHOLD NIEBUHR: A MENTOR TO THE TWENTIETH CENTURY 205 (1992)); Mashburn, *Professionalism*, *supra* note 15, at 102 (noting that Niebuhr exhibits “a psychological ethic grounded in pragmatism and . . . moral realism. . . . Niebuhr believed that consequences determine the rightness of actions.”).

<sup>26</sup> NIEBUHR, MORAL MAN AND IMMORAL SOCIETY, *supra* note 16, at 3-4 (“[S]entiments of benevolence and social goodwill will never be so pure or powerful, and the rational capacity to consider the rights and needs of others . . . will never be so fully developed as to create . . . [a] social utopia.”).

<sup>27</sup> *See* Berg, *supra* note 18, at 1602-03 (citing to Niebuhr’s writings).

<sup>28</sup> Mashburn, *Paradox*, *supra* note 15, at 745 (footnote omitted); *see generally* REINHOLD NIEBUHR, CHRISTIANITY AND POWER POLITICS (Archon Books 1969) (1940) (setting forth and defending the notion that pragmatic use of American political, economic, and military power was moral when used in opposition to fascism and other negative forces).

impact of that analysis on the issue at hand,”<sup>29</sup> a view consistent with that of other Niebuhr scholars.<sup>30</sup> Indeed, Niebuhr’s own writings amply reflected his realistic view of humanity.<sup>31</sup> For example, in summarizing one of his early books more than thirty years later, he reflected:

My first venture in political philosophy, published in 1932, was entitled *Moral Man and Immoral Society*. Its thesis was the obvious one, that collective self-regard of class, race and nation is more stubborn and persistent than the egoism of individuals. This point seemed important, since secular and religious idealists hoped to change the social situation by beguiling the egoism of individuals, either by adequate education or by pious benevolence. A young friend of mine recently observed that, in the light of all the facts and my more consistent “realism” in regard to both individual and collective behavior, a better title might have been *The Not So Moral Man in His Less Moral Communities*.<sup>32</sup>

Although Niebuhr came to dislike the use of terms like “original sin” or labeling people as “sinners,”<sup>33</sup> his writing consistently takes the view that people<sup>34</sup> indeed are flawed and capable of problematic, even evil behavior.<sup>35</sup>

<sup>29</sup> See Mashburn, *Paradox*, *supra* note 15, at 748-49. For example, Niebuhr was sympathetic to the cause of greater racial equality but was realistic regarding the means to its attainment. See, e.g., NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY*, *supra* note 16, at 252-53 (“[I]t is hopeless for the Negro to expect complete emancipation from the menial social and economic position into which the white man has forced him, merely by trusting in the moral sense of the white race . . . . However, . . . the white race in America will not admit the Negro to equal right if it is not forced to do so.”); Reinhold Niebuhr, *The Negro Minority and Its Fate in a Self-Righteous Nation*, in *A REINHOLD NIEBUHR READER: SELECTED ESSAYS, ARTICLES, AND BOOK REVIEW* 118 (Charles C. Brown ed. 1992).

<sup>30</sup> See, e.g., Mashburn, *Professionalism*, *supra* note 15, at 102. For example, despite his abhorrence of Nazism, Niebuhr was among “the ranks of those skeptical or firmly opposed to the *Nuremberg* prosecutions” as part of “an all-star roster of the American legal and political worlds” that included Max Rheinstein, Chief Justice Harlan Fiske Stone, Justice William O. Douglas, Judges Learned Hand and Charles Wyzanski, Senator Robert Taft, and “even the widely influential” Niebuhr. See Bush, *supra* note 17, at 2059.

<sup>31</sup> See, e.g., NIEBUHR, *MAN’S NATURE AND HIS COMMUNITIES*, *supra* note 16, *passim*; NIEBUHR, *supra* note 22, at Ch. 2; see generally NIEBUHR, *THE NATURE AND DESTINY OF MAN*, *supra* note 16; NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY*, *supra* note 16.

<sup>32</sup> NIEBUHR, *MAN’S NATURE AND HIS COMMUNITIES*, *supra* note 16, at 22 (also noting that “world depression and the rise of the Nazi terror swept away the last remnants of liberal utopianism”).

<sup>33</sup> See *id.* at 23-24 (explaining his rejection of the term but not backing away from realistic/cynical view of humankind).

<sup>34</sup> Niebuhr’s writing is shot through with references to “man,” “mankind,” and other forms of speech that appear outmoded today and can even be grating to the modern reader viewing Niebuhr’s work decades after the feminist revolution (which I think can safely be called a success despite continuing backlash and continuing resistance to women’s rights). The casual reader might dismiss Niebuhr as sexist and traditionalist, which he perhaps may have been. But one must, in the spirit of Professor Riskin’s scholarship, be open-minded and charitable, giving Niebuhr the benefit of context and history. He wrote all of his significant work before 1965 and died in 1971. Betty Friedan’s *The Feminine Mystique*, generally acknowledged as a key event in the modern women’s rights movement, was published in 1963. *MS Magazine* was founded in 1972. Of course, Gloria Steinem and Friedan were preceded by Susan B. Anthony and others urging greater equality for women, but until the 1970s, most focus of the movement was on concrete actions (e.g., the right to vote, commercial rights, employment rights, political rights such as jury service) rather than the more symbolic (but important) right to a less sexist vocabulary. See also NIEBUHR, *MAN’S NATURE AND HIS COMMUNITIES*, *supra* note 16, at 28-29 (giving credit to his wife, Ursula, to

Niebuhr's assessment of humanity is perfectly consistent with the Riskin-Fisher-Shapiro core concerns: Niebuhr simply sees people as perhaps more selfishly gripped by these concerns than does the casual observer or the negotiator or mediator occasionally overcome with optimism in the cause of resolving a dispute. "Man's self-seeking and self-giving are intricately related in the human self."<sup>36</sup> Individuals often, or perhaps usually, attempt to secure or improve their own lot even where this harms others.<sup>37</sup> People need not be cruel or intentionally hurtful to inflict harm through self-interest. For example, a worker who opposes government efforts to shut down a polluting manufacturing plant out of fear of job loss usually intends no harm to others but merely wants to preserve a paycheck and its attendant economic and social security. But the worker's efforts to keep the plant operational may well impose the environmental costs of plant operation onto third parties such as local residents breathing polluted air.

## 2. *Niebuhr and Negotiation*

Whether Niebuhr ever heard the Cherokee legend of the two wolves battling for control of the human spirit is unknown. But Niebuhr's own world view appears much like that of the Cherokee grandfather in that it acknowledges the dichotomy and tension in people and urges that political and social systems (including, implicitly, law and dispute resolution) encourage the better aspects of human nature while self-consciously taking steps to suppress humanity's negative traits.<sup>38</sup> To carry forward the metaphor, Niebuhr advocated feeding the good wolf and attempting to starve, or at least contain, the evil wolf.

In addition, Niebuhr, at least as I read him, also suggests not only that good and evil struggle for control of each person but also that some individuals or institutions can become primarily evil or perhaps are evil (at least by the time they are adolescents or adults). To push the Cherokee metaphor: some disputants are not just the situs of warring wolves but can become predominantly bad wolves, with consequent implications when one must negotiate with them or mediate their disputes. Although humans as a species mix good and bad traits, Niebuhr appears to accept that there are some inevitable bad apples in any bushel of humans. Recognition of this fact requires some recalibration of dispute resolution models so that disputants know when not to negotiate as well as when to negotiate. With "bad" disputants, good disputants may be

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whom the book is dedicated, for substantial impact on his thought: "I cannot, therefore, promise that this summary of my lifework is strictly my own. . . . except to say this volume is published under my name, and the joint authorship is not acknowledged except in this confession. I will leave the reader to judge whether male arrogance or complete mutuality is the cause of this solution.").

<sup>35</sup> See *infra* text accompanying notes 38-42.

<sup>36</sup> NIEBUHR, *MAN'S NATURE AND HIS COMMUNITIES*, *supra* note 16, at 106; see also *id.* at 31 ("When man first begins to think, he thinks of himself first.").

<sup>37</sup> NIEBUHR, *THE NATURE AND DESTINY OF MAN*, *supra* note 16, at 190; Mashburn, *Paradox*, *supra* note 15, at 753 (noting that in Niebuhr's view, "we [often] seek to guarantee our own security at the expense of others").

<sup>38</sup> See NIEBUHR, *MAN'S NATURE AND HIS COMMUNITIES*, *supra* note 16, at 63; NIEBUHR, *supra* note 22, at Ch. 2; see generally NIEBUHR, *THE NATURE AND DESTINY OF MAN*, *supra* note 16; NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY*, *supra* note 16.

wasting their time in negotiation or mediation, which in turn requires good faith disputants to assess other parties and recognize the occasional bad wolves.<sup>39</sup>

Niebuhr's notion of good and evil in each person or in social groups runs throughout his writings. His notion that a subset of bad people and social actors may create particular problems beyond the imperfections found in society generally is less apparent, but perhaps most associated with *The Children of Light and the Children of Darkness*, originally published in 1944. *Children* is clearly influenced by the "Nazi barbarism"<sup>40</sup> of the time and the horrors of World War II and the Holocaust.<sup>41</sup> Niebuhr's "central thesis" in *Children* was:

that a free society prospers best in a cultural, religious and moral atmosphere, which encourages neither a too pessimistic nor too optimistic view of human nature. Both moral sentimentality in politics and moral pessimism encourage totalitarian regimes,

<sup>39</sup> Professor Mnookin's template of considerations for determining "When Not to Negotiate" appear geared to the situation rather than the disputants and their personal traits. In determining whether to negotiate, there are:

six questions that should be addressed, four of which draw from negotiation analysis. Negotiation imperialists—myself included—suggest that in preparing for a negotiation a party should identify its own interests and those of the other parties; think about each side's BATNA [best alternative to a negotiated agreement]; try to imagine options that might better serve the negotiators' interests than their BATNAs; and ensure that commitments made in any negotiated deal have a reasonable prospect of actually being implemented. These same considerations are equally valid in informing an individual's decision whether one should enter into a negotiation. In addition, one must also consider the expected costs—both direct and indirect—of engaging in the negotiation process, as well as issues of legitimacy and morality.

Mnookin, *supra* note 11, at 1083. The Mnookin template counsels the incipient negotiator to ask,

Is there a reliable negotiation partner? Is there a negotiation counterpart with whom I can negotiate a sufficiently enforceable deal? Even when one can imagine a negotiated deal that better serves each party than its best alternative, it may nonetheless make no sense to initiate negotiations if one believes the other party would never uphold its end of the bargain and there is no effective mechanism for enforcing the negotiated deal. In some instances, it may simply be a matter of trust.

*Id.* at 1085. Beyond this important observation, I am further suggesting that the very identity, personality, or orientation of one or more of the disputants may counsel against negotiation, or at least against protracted negotiation effort. The presence of even one sufficiently bad wolf may preclude effective negotiation regardless of the other factors used in the Mnookin template.

<sup>40</sup> NIEBUHR, *supra* note 22, at 7 ("Nazi barbarism is the final fruit of a moral cynicism which has only a subordinate note in the cultural life of the modern period, and which remained subordinate until very recently."), 11 (democratic world came "close to disaster" in part because "it never believed that Nazism possessed the demonic fury which it avowed"); *see also id.* at xii (referring in Foreword to First Edition to "contemporary experience" that refutes optimism about human nature).

<sup>41</sup> One is tempted to see the Stalinist Soviet Union as an additional influence in light of Stalin's brutality rivaling that of Hitler. However, *CHILDREN* never discusses Stalin or the rise of Mao's totalitarianism in China. The bloody Cultural Revolution in China was nearly twenty years away and Stalin's atrocities were not fully appreciated until after his death in 1953 and publications such as *The Gulag Archipelago*, which publicized the regime's oppression. ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (Thomas P. Whitney trans., 1973); *see also* Byung-joon Ahn, *The Cultural Revolution and China's Search for Political Order*, 58 *CHINA Q.* 249, 257-258 (1974) (noting that despite the benign name, the Cultural Revolution, Chinese Communist Party leader Mao Zedong's attempt to consolidate control and enforce ideological orthodoxy, included a considerable amount of imprisonment and killing of Mao's enemies with little regard for due process or human rights).

the one because it encourages the opinion that it is not necessary to check the power of government, and the second because it believes that only absolute political authority can restrain the anarchy created by conflicting and competitive interests.<sup>42</sup>

As one scholar noted, two important elements of Niebuhr's social ethic are "individual responsibility and the pervasiveness of evil,"<sup>43</sup> the latter being substantially aided by "the self-deception of the righteous."<sup>44</sup> Niebuhr noted that his book:

grew out of my conviction that democracy has a more compelling justification and requires a more realistic vindication than is given it by the liberal culture with which it has been associated in modern history. The excessively optimistic estimates of human nature and of human history with which the democratic credo has been historically associated are a source of peril to a democratic society; for a contemporary experience is refuting this optimism and there is danger that it will seem to refute the democratic ideal as well.<sup>45</sup>

If one substitutes "dispute resolution" for "democracy," Niebuhr's realistic view of humanity provides ample support for Fisher and Shapiro's recommendation that negotiators and mediators focus on the core concerns and address disputant emotions in a self-conscious manner. Additionally, it also supports Riskin's advocacy of self-conscious efforts to become and remain mindful of participant emotions when attempting to resolve disputes. Disputants may alternately act like children of light or children of darkness, like good wolves or bad wolves. Consequently, a major part of the negotiator or mediator's task is to recognize the potential emotions at work and to be sufficiently mindful to

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<sup>42</sup> NIEBUHR, *supra* note 22, at viii (New Forward to 1960 Scribner paperback edition). Niebuhr summarized the thrust of the book in similar fashion in his forward to the 1944 inaugural edition:

A free society requires some confidence in the ability of men to reach tentative and tolerable adjustments between their competing interests and to arrive at some common notions of justice which transcend all partial interests. A consistent pessimism in regard to man's rational capacity for justice invariably leads to absolutistic political theories; for they prompt the conviction that only preponderant power can coerce the various vitalities of a community into a working harmony. But a too consistent optimism in regard to man's ability and inclination to grant justice to his fellows obscures the perils of chaos which perennially confront every society, including a free society. In one sense a democratic society is particularly exposed to the dangers of confusion. If these perils are not appreciated they may overtake a free society and invite the alternative evil of tyranny.

But modern democracy requires a more realistic philosophical and religious basis, not only in order to anticipate and understand the perils to which it is exposed; but also to give it a more persuasive justification. Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary.

*Id.* at xiii (Foreword to First Edition (1944), reprinted in 1960 Scribner paperback edition).

<sup>43</sup> See Mashburn, *Paradox*, *supra* note 15, at 754.

<sup>44</sup> See *id.* at 755 ("Niebuhr concluded that the self-deception of the righteous constitutes the 'chief engine of evil in the world.'" (quoting NIEBUHR, *PIOUS AND SECULAR AMERICA*, *supra* note 16, at 144)). As Professor Mashburn observed, "Given the prevalence and power of evil, it is odd that so much of modern ethics ignores or minimizes its reality. Niebuhr attributes this omission to a naive misconception about the goodness of human nature. Modern culture retains its stubborn optimism and vehemently rejects the notion that people are sinful at the very centers of their personalities . . ." Mashburn, *Paradox*, *supra* note 15, at 755 (footnotes omitted).

<sup>45</sup> NIEBUHR, *supra* note 22, at xii (Foreword to First Edition (1944), reprinted in 1960 Scribner paperback edition).

address them in a manner that makes effective interest-based bargaining possible.

In related fashion, the mindful negotiator or mediator should also realize that in addition to the typical disputant with warring wolves and light and dark temperaments, there are some disputants who are so in the grip of negative emotions that they are in essence habitually bad wolves. Some may even be intrinsically bad wolves, sociopaths of dispute resolution that are incapable of proceeding in good faith. This subset of disputants may respond only to coercive forces such as adjudication and its penumbral shadow.

A part of Niebuhr's basic thesis was not only that light and dark war within each person, but that in some persons or societies, the dark wins out, at least for a substantial period of time.<sup>46</sup> Some people consistently are open, truthful, cooperative, sacrificing, helpful, and interested in pursuing and maintaining a fair society—or a fair resolution of a controversy. Others are self-centered, hateful toward at least some others in society, and interested in improving their lot at the expense of others. Most exhibit a range of traits, emotions, and behaviors. The intensity of their altruism, self-interest, happiness, anger, optimism, affection or dislike varies according to the circumstances of context, mood, health, and other factors.

Approaching this situation from both a theological perspective and a political perspective, Niebuhr was essentially arguing not only that we should not be excessively pessimistic or optimistic about people in general, but also that we should recognize that there are bad people in society. In order to protect the "good" people from the "bad," society on occasion needs to make clear distinctions and to take a firm stand against those who act in a socially unacceptable manner.

In illuminating this important distinction more fully, we may well designate the moral cynics, who know no law beyond their will and interest, with a scriptural designation of "children of this world" or "children of darkness." Those who believe that self-interest should be brought under the discipline of a higher law could then be termed "the children of light." This is no mere arbitrary device; for evil is always the assertion of some self-interest without regard to the whole, whether the whole be conceived as the immediate community, or the total community of mankind, or the total order of the world. The good is, on the other hand, always the harmony of the whole on various levels. . . . "The "children of light" may thus be defined as those who seek to bring self-interest under the discipline of a more universal law and in harmony with a more universal good.

. . . .

The children of darkness are evil because they know no law beyond the self. They are wise, though evil, because they understand the power of self-interest.<sup>47</sup>

Of course, appreciating the concept of bad wolves in the herd is only a partial solution. The most effective negotiators and mediators will recognize and identify children of darkness. This should be done not on the basis of stereotypes (e.g., all corporate executives are selfish, all government officers

<sup>46</sup> NIEBUHR, *supra* note 22, at 9-10.

<sup>47</sup> *Id.* Niebuhr ascribed a good part of the world's turmoil at the time he wrote as occurring because the good forces of society had "underestimated the power of self-interest, both individual and collective, in modern society. These children of light have not been as wise as the children of darkness." *Id.* at 10.

are untrustworthy) but instead based on the observed conduct of disputants as measured by objective factors. For example, if a disputant is repeatedly failing to fulfill preliminary commitments, changing stories, holding back information, bullying, dissembling, or failing to display respect for participants and the process, a reasonably non-naïve negotiator or mediator should recognize the disputant (or its agent) as a bad wolf.

### 3. *Applying the Niebuhrian Approach in a Classic Case of Failed Negotiation*

In the context of the horrors of Nazi Germany, the implications of Niebuhr's thesis were fairly straightforward. At a minimum, the corrective actions of the Allies, which displaced evil fascist regimes and liberated their victims (several million deaths too late), were justified, even though there was unavoidable collateral damage throughout Europe and Japan. At its most controversial application, the Niebuhrian view could (in my assessment) support seemingly cruel wartime acts such as use of the atomic bomb at Hiroshima and Nagasaki and the fire-bombing of Dresden.<sup>48</sup>

Looking further back at the problem, during Hitler's early years, Niebuhr's worldview suggests that efforts to accommodate the recalcitrant but charismatic monster were a major mistake. After the ill-fated "Beer Hall Putsch," Hitler probably should have been imprisoned for a longer period and prevented from participation in politics. (He was, after all, a traitor.)<sup>49</sup> Certainly, Weimar Republic Chancellor von Hindenberg should not have negotiated with Hitler and reached the accord that resulted in Hitler becoming Weimar Germany's chancellor at the age of forty-four, a mere ten years after his unsuccessful attempt to overthrow the government in the Beer Hall Putsch

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<sup>48</sup> I realize I am metaphorically venturing out on a controversial limb here, both regarding the justification of bombing that destroys cities and whether Niebuhr would have accepted it as a necessary part of subduing children of darkness to reinstate the civilization of light. His writing does not appear to have specifically addressed the issue. Because the Allies were attacked first and were trying to eliminate the ability of the Axis to engage in unprovoked, unjustified, and oppressive violence (something the Axis powers had already done), military action was obviously justified, including action that held significant promise for ending the war more quickly, favorably, and decisively, even at the cost of civilian deaths and some perhaps gratuitous destruction of enemy nation property. To refrain from such actions arguably would only prolong the conflict at the cost of additional Allied lives. The goodness of the children of light need not be masochism. A decent person does no unnecessary harm and attempts to avoid harm to others, but need not voluntarily injure himself to retain essential decency. Niebuhr's children of light are good people, but are not martyrs or patsies.

<sup>49</sup> The Beer Hall Putsch was Hitler's attempt to initiate an uprising against the government at the relatively tender (if one can use that term with Hitler) age of 34. The rabble-rousing was quickly put down by Bavarian authorities and Hitler was arrested and imprisoned, but served fewer than nine months of his five-year sentence. It was during this time that he wrote *Mein Kampf*. See Samuel Willard Crompton, *Hitler's "Beer Hall" Putsch Trial: 1924*, in GREAT WORLD TRIALS 216, 216-21 (Edward W. Knappman, ed., 1997); FRANK McDONOUGH, *HITLER AND THE RISE OF THE NAZI PARTY* 49 (2003) (noting that Beer Hall Putsch was the "most significant event in the early history of the Nazi Party," but "a hurriedly planned, bungled and humiliating failure"); WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 68-70, 75-79 (1960); see generally Jeremy Noakes, *The Rise of the Nazis*, HISTORY TODAY, Jan. 1933, at 8.

episode.<sup>50</sup> From the Chancellor's post, Hitler used levers of power to obtain additional power, ultimately subduing democratic and humanistic forces and installing a military dictatorship.<sup>51</sup>

In the now well-chronicled episode of the Sudetenland, a portion of what is now the Czech Republic, Hitler successfully stole the territory in what has become a poster child for ineffective negotiation. Other countries, led by Great Britain, in essence consented to Hitler's land grab of the Sudetenland and its annexation by Germany because they did not oppose it with force and even arguably endorsed it.<sup>52</sup> Neville Chamberlain, the British Prime Minister, lauded the arrangement as one that would preserve "peace in our time."<sup>53</sup> Of

<sup>50</sup> See McDONOUGH, *supra* note 49, at 90-91; SHIRER, *supra* note 49, at 184-90; JOHN W. WHEELER-BENNETT, *WOODEN TITAN: HINDENBURG IN TWENTY YEARS OF GERMAN HISTORY* 426-31 (1963); *see also* McDONOUGH, *supra* note 49, at 99 ("Hitler was faced at every turn during the early 1930s by weak and vacillating opponents.").

<sup>51</sup> See SHIRER, *supra* note 49, at 190-276; DAVID A. WELCH, *JUSTICE AND THE GENESIS OF WAR* 139 (1993). For example, when the Reichstag (Germany's legislative building) was burned, Chancellor Hitler blamed it on political foes and used it to consolidate power and take action against his enemies. Most historians are quite sure that Hitler or his supporters intentionally set the fire, although it is possible Hitler merely seized on the event in a moment of opportunism. SHIRER, *supra* note 49, at 191-96. It appears that Hitler frequently considered the staging of anti-German events for use as a pretext for aggression. Gerhard Weinberg, *Reflections on Munich After 60 Years*, in *THE MUNICH CRISIS, 1938: PRELUDE TO WORLD WAR II* 3-4 (Igor Lukes & Erik Goldstein eds., 1999). The Nazis:

thought seriously of arranging the killing of the German military attache or ambassador in Vienna to provide a pretext for the invasion of Austria but eventually settled for a faked request for troops to march in. In 1938 they at first thought of staging the killing of the German minister in Prague to provide the proper pretext for war with Czechoslovakia . . . . Instead of murdering the German minister, [the Nazis] created a gang of Sudeten German thugs and provided them with a quota of incidents to be staged at regular intervals . . . .

*Id.*

<sup>52</sup> See SHIRER, *supra* note 49, at 358-427. The Sudetenland is a territory now in the Czech Republic that, prior to World War I, was part of Germany, but was taken away as a consequence of Germany's defeat in the war. A substantial portion of its population spoke German and was of German ethnicity. Hitler effectively played on Germany's sense of humiliation from its defeat in World War I to make regaining the Sudetenland a cause célèbre among the German people. After his military buildup in the mid-to-late 1930s, Hitler sought to flex his muscle and reincorporate the Sudetenland into Germany. There was, however, concern that such action might trigger a military response. Great Britain was the key nation on this point and took the lead in negotiations regarding the issue, although France and Italy were involved.

The negotiations between Hitler's Germany, England, France, and Italy regarding the territory are often referred to as resulting in the "Munich Pact" in which "territorial concessions were made by Britain and France to Adolf Hitler with the hope that Hitler's bellicose ambitions could be 'appeased.'" Lionel D. Warshauer, *The Munich Pact of 1938: ADR Strategies for our Time?*, 5 *CARDOZO J. CONFLICT RESOL.* 247, 248 (2004) (citing ALAN BULLOCK, *HITLER AND STALIN* 622 (2d ed. 1991)); *MUNICH: BLUNDER, PLOT, OR TRAGIC NECESSITY?* vii (Dwight E. Lee ed., 1970)); *see also* *THE MUNICH CRISIS, 1938*, *supra* note 51, at ix (noting that the term "Munich" has come to be a shorthand reference for "ill-fated diplomatic initiatives" and "appeasement" of disagreeable persons, entities, or countries); Charles A. Schiller, Note, *Closing a Chapter of History: Germany's Right to Compensation for the Sudetenland*, 26 *CASE W. RES. J. INT'L L.* 401, 410-19 (1994).

<sup>53</sup> Warshauer, *supra* note 52, at 247 (quoting Chamberlain as stating that he had "returned from Germany bringing peace with honor. I believe it is peace for our time."). As Hitler's desire to annex the Sudetenland became known, Britain and other powers sought to discour-

course, Chamberlain proved to be ridiculously wrong. The easy acquisition of Czech territory only emboldened Hitler, who within a few years had captured much of continental Europe and was bombing Britain.<sup>54</sup> Arguably, it was only the intervention of the United States, spurred by Japan's ill-fated decision to attack Pearl Harbor, which prevented Chamberlain's now-reviled "appeasement"<sup>55</sup> from bringing the destruction of the United Kingdom.<sup>56</sup>

At the risk of flaying a straw man, Chamberlain's appeasement of Hitler is illustrative of the limits of mindfulness and core concerns negotiation to imagine how little impact it can have in bringing reasonable dispute resolution to

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age it but eventually agreed not to intervene based on Hitler's assurances that there would be no additional similar acts of aggression by Germany. See Nicholas J. Cull, *The Munich Crisis and British Propaganda Policy in the United States*, in *THE MUNICH CRISIS*, 1938, *supra* note 51, at 222 ("Initially, most Americans favoured Chamberlain's bid to solve the Czech crisis by negotiating with Hitler."); Erik Goldstein, *Neville Chamberlain, the British Official Mind and the Munich Crisis*, in *THE MUNICH CRISIS*, 1938, *supra* note 51, at 276, 290; SHIRER, *supra* note 49, at 360 ("All through the spring and summer [of 1938], indeed almost to the end [of the negotiations that ceded the Sudetenland to Germany], [British] Prime Minister Chamberlain and [French] Premier Daladier apparently sincerely believed, along with most of the rest of the world, that all Hitler wanted was justice for his kinsfolk in Czechoslovakia.").

<sup>54</sup> See SHIRER, *supra* note 49, at 625-757 (describing Nazi success during early years of World War II); Rudolph W. Giuliani, *Combating Terrorism*, 16 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 57, 62 (2002); Warshauer, *supra* note 52, at 249-50; Ellis Washington, *Reply to Judge Richard A. Posner on the Inseparability of Law and Morality*, 3 *RUTGERS J.L. & RELIGION* 1, 88 n.140 (2001).

<sup>55</sup> Chamberlain is frequently held up in ridicule as an appeaser by military or foreign policy "hawks" in the United States. For example, politicians and commentators opposing or even questioning the United States invasion of Iraq in 2003 were accused of Chamberlain-style "appeasement" of a Hitler-like Saddam Hussein. The rationale for the invasion, now labeled a pretext by many, was that Saddam was developing nuclear and chemical "weapons of mass destruction," a term that now has almost comic connotation. See, e.g., Stephen M. Walt, *The Shattered Kristol Ball*, in *The Neocons vs. the Realists*, 97 *NAT'L INT.*, Sept.-Oct. 2008, at 20, 26, 28 (2008); Roy Williams, *Second Thoughts*, *AUSTL. LITERARY REV.*, Dec. 3, 2008, at 8; see generally Jeffrey Record, *Retiring Hitler and "Appeasement" from the National Security Debate*, 38 *PARAMETERS: US ARMY WAR C. Q.*, Summer 2008, at 91, 92. Although recent criticism of Chamberlain and appeasement tends to come from the political right, there is a similarly strong tradition of such criticism from the left as well. For example, Bertolt Brecht's play, *The Resistible Rise of Arturo Ui*, is a thinly disguised theatrical version of Hitler's rise, placing the Hitlerian main character in the body of a Chicago gangster who rises from obscurity to take over the city, largely because no one was willing to call his bluff. BERTOLT BRECHT, *THE RESISTIBLE RISE OF ARTURO UI* (1941).

Obviously, by referring to the Hitler-Chamberlain-Sudetenland example, I am not suggesting that any reluctance to engage in military action is appeasement of tyrants, nor am I suggesting that the U.S., or any other nation, has carte blanche authority to invade countries it thinks might be developing dangerous weapons. Rather, I am contending that, in situations where a disputant is a bad wolf unwilling to bargain in good faith, negotiation may be ineffective and dispute resolution will require some measure of coercion and perhaps even full dress adjudication.

<sup>56</sup> By 1940, only three years after the "accord" permitting Hitler to invade Czechoslovakia without resistance, Germany bombed England in what became known as the Battle of Britain, a series of German air raids that destroyed much of London and other parts of England. See SHIRER, *supra* note 49, at 781. Of course, Chamberlain was not the only politician duped by Hitler. In addition to Hindenburg and other German rivals, Hitler also took advantage of the arguably even more bloodthirsty Russian dictator Josef Stalin by entering into a non-aggression pact with Stalin only to break it by invading Russia. See *id.* at 513-544.

situations where a disputant is a child of darkness (to use Niebuhr's term) or a bad wolf (to borrow from the Cherokee legend). Imagine how Chamberlain's efforts to utilize the core concerns to address negative emotions underlying Hitler's territorial aggression would have sounded and worked in practice.

CHAMBERLAIN: Adolph, I never realized how much it bothered the German people to be geographically and politically separated from their ethnic relatives that have been on the Czechoslovakian side of the border. You're right that the borders were drawn in some haste after the end of World War I. They don't logically make sense in all cases.

And you have a point that some of the conditions of the treaty that ended the War were very punitive to Germany. I see now that it has hurt and stigmatized your citizens, as well as making things very difficult economically. All of us on the other side during the War need to appreciate just how difficult things have been for Germany, and how much you've accomplished in rebuilding after the War. We also need to bring Germany back into the fold of nations and give it the status and role it deserves.

But it seems to me that there are better ways of accomplishing this than redrawing borders or expanding German territory. You have to realize that this will be threatening to many Europeans, and will create a climate where it will be harder to give Germany the status and role it deserves and to more closely affiliate it with the family of nations. In addition, it's important that all of us try to preserve international order and harmony.

Let's focus on interests rather than positions or the past. Your interest is in reintegrating Germany into the world community, building a better life for its people, and in restoring pride and confidence. Seeking to acquire Czech territory is only your position—what you are claiming—but it is not necessarily your interest.<sup>57</sup> Your interest is in having a more secure Germany and lowering barriers to interaction between the German-speaking population of Czechoslovakia and that of Germany.

Instead of focusing on the Sudetenland, let's explore ways of making things better for your citizens and all Europeans, particularly those of German ethnic heritage. What we should be considering is increased economic aid, lower trade barriers, removal of impediments to travel, getting integrated with the League of Nations [Germany had withdrawn from the League of Nations in 1933 in Hitler's first important act of foreign policy as Chancellor],<sup>58</sup> things like that. Progress along those lines would meet your interest much more than simply ceding some Czech territory to you.

HITLER: Neville, you really don't understand how strongly I and my people feel about this. Sudetenland used to be part of Germany. Its population is overwhelmingly German in heritage and the language is widely spoken. It belongs with us.

If we can't make it part of Germany again by agreement, we'll take it by force. I'm betting you won't put British soldiers at risk to stop me—and you shouldn't. German annexation of the Sudetenland doesn't cost England anything.

Your interest is in avoiding unnecessary foreign entanglements and in conserving your resources. We are, after all, still in the throes of a worldwide depression (although my massive public works projects and re-militarization actually have Germany in better economic shape than much of the rest of Europe). Just let us have the territory without a fuss and we can avoid war and go about our respective business.

<sup>57</sup> See Riskin & Welsh, *supra* note 11, at 863 n.3 (“A ‘position’ is what a party says she wants or is entitled to; an ‘interest’ is the need or goal that motivates the party to assert the position.” (citing FISHER & URY, *supra* note 3, at 40-42)).

<sup>58</sup> See WELCH, *supra* note 51, at 139; Warshauer, *supra* note 52, at 252, n.28.

Your BATNA<sup>59</sup> here is bloodshed. Your countrymen will not be happy with that outcome while mine are willing to die to reintegrate this territory into the homeland. You're better off accommodating me, at least for now.

This hypothetical conversation is on one level absurd, but, at the same time, perhaps not all that different from what actually seems to have transpired as a result of the Chamberlain-Hitler negotiations.<sup>60</sup> As one commentator observed in looking closely at the Sudetenland negotiations through the lens of modern ADR theory, one can argue that Chamberlain in fact utilized several normally apt negotiating techniques in his quest of peaceful resolution.<sup>61</sup> But Chamberlain also committed errors by granting concessions too readily, perhaps mistaking Hitler's anger for sincerity or candor, and by too easily trusting Hitler to make and keep bargains in good faith, even though Chamberlain appeared to understand that Hitler was a bad man.<sup>62</sup> Of course, the Sudeten-

<sup>59</sup> "BATNA" stands for "Best Alternative to a Negotiated Agreement" and is a term popularized in FISHER & URY'S *GETTING TO YES*, *supra* note 3, at 101. Under standard modern negotiation theory, a negotiator should realistically assess the best outcome that can be obtained in the absence of agreement (e.g., not building the mall, building the mall without a Neiman-Marcus store, prevailing in damages litigation over a breach of lease when a planned tenant fails to establish and operate a store, etc.). For example, if a state wants to build a highway, it ideally will purchase land from private owners in the planned road's path. But what if some or all of the landowners say no? The obvious alternatives are: (a) dropping the road project; (b) rerouting the road through land owned by those willing to sell; or (c) exercising the state's power of eminent domain to seize the land and pay court-ordered fair market compensation to the landowners who refused to sell. Depending on the facts and circumstances, any of the three of these options may be the "best" alternative to the failed negotiation with the original landowners. In the Chamberlain-Hitler context, Sudetenland negotiations failed in part because Chamberlain lacked a realistic BATNA due to the relative weakness of the British military and isolationist sentiment among the British population, which meant that Chamberlain was not in a good military position to intercede if Hitler invaded. Warshauer, *supra* note 52, at 272-75.

<sup>60</sup> Similarly strange things have happened more recently in the real world. Bernhard Goetz, who later became famous as the victim who fought back against a gang of toughs (by shooting and seriously wounding one) had previously been mugged and was asked to mediate with the mugger, an experience that left Goetz embittered and perhaps a little too hair-trigger in his response to the subsequent threatening situation. Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1808-09 (1986); see also Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1308-09 (1994) (finding mediation inappropriate for criminal matters); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 997 n.270 (1985) (discussing the controversy surrounding Goetz). But see MARK S. UMBREIT ET AL., *FACING VIOLENCE: THE PATH OF RESTORATIVE JUSTICE AND DIALOGUE* 45-52 (2003) (presenting a more positive view of efficacy in victim-offender mediation). Goetz was, however, acquitted when charged with attempted murder. *Step-by-Step: A Shooting, a Dismissal*, N.Y. TIMES, Jan. 17, 1986, at B3.

<sup>61</sup> See Warshauer, *supra* note 52, at 254-59. For example, Chamberlain was willing to hold the negotiations in Germany, Hitler's "turf," as a means of attempting to build trust and rapport. Chamberlain did not react aggressively to Hitler's verbal tirades and seemed to be trying to separate the people involved from the problem itself, as urged in modern negotiation theory. See also *id.* at 261 (Chamberlain arguably focused on objective criteria rather than subjective emotions in attempting to resolve dispute), 263 (Chamberlain attempted to be cooperative rather than competitive in negotiating).

<sup>62</sup> See *id.* at 256 n.47 (Chamberlain thought Hitler, despite his "hardness and ruthlessness" could be "relied upon to keep his word"), 259-60 (Chamberlain agreed to negotiate without

land negotiations preceded *Getting to Yes* and the Fisher-Shapiro core concerns by nearly a half-century. Nonetheless, one can argue that among Chamberlain's mistakes in the negotiations was an undue willingness to approach Hitler as one would reasonable people like Phil, Jack, Bill Clinton, or Newt Gingrich.

A more mindful Chamberlain might have appreciated that his opponent was the poster child of darkness and that negotiated resolution was unlikely to end Hitler's desire for additional territory. Instead of essentially giving in on the Sudetenland, Chamberlain would likely have been better off to militarize England, urge similar action by anti-Hitler forces, and nurture resistance movements (e.g., through arms, military advisers) in the areas (e.g., Poland, which was invaded in 1939) vulnerable to German expansion. At a minimum, Chamberlain could have refused to negotiate, as Winston Churchill did in refusing to talk with Mussolini "and indirectly with Hitler—in May of 1940. . . . Churchill's refusal to negotiate reflected a number of considerations, one of which was his skepticism that Hitler would abide by any deal that might be at all acceptable to his government . . . ."<sup>63</sup>

In a sometimes overlooked aspect of the Sudetenland matter, Benito Mussolini, at Chamberlain's request, acted as a mediator in the dispute.<sup>64</sup> I wish I was kidding. Mussolini, Hitler's fellow traveler of fascism and soon-to-be-ally in World War II, acted as mediator at a Munich Conference involving England, France, Germany, and Italy.<sup>65</sup> Not surprisingly, the results, like that of an earlier attempted mediation by Britain's Lord Runciman, were ineffective.<sup>66</sup> Mussolini's mediation was of course doomed from the start (at least from the perspective of the Allies) because he was a corrupt mediator who proposed a resolution ghost-written by Hitler and, unsurprisingly, accepted by Hitler.<sup>67</sup> However, even with a truly neutral mediator,<sup>68</sup> the Sudetenland issue was

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Czechoslovakia's presence even though the issue, of course, involved Czech territory), 261 (Chamberlain was too quick to make concessions and insufficiently appreciative of the nature of the concessions), 264 (Chamberlain was betting against himself in the negotiation), 265 n.94 (Chamberlain perhaps viewing Hitler's anger as a proxy for sincerity).

<sup>63</sup> Mnookin, *supra* note 11, at 1088. "[A] primary reason for Churchill's refusal related to his concern that the act of negotiating with the Axis would have a devastating impact on the morale of his constituents and their ability to make the sacrifices necessary if negotiations failed." *Id.* (citing JOHN LUKACS, *FIVE DAYS IN LONDON: MAY 1940* (1999)). Of course, Churchill had the luxury of learning from Chamberlain's mistake and by 1940, Hitler's true colors were more apparent as the Third Reich was in a more overt war mode. *Id.* ("[As of May 1940,] Churchill had just become Prime Minister, France had very nearly been overrun, and tens of thousands of British troops appeared to be trapped around Dunkirk. The Battle of Britain had just begun, and German bombers had launched their attack.")

<sup>64</sup> Warshauer, *supra* note 52, at 267, 267 n.102.

<sup>65</sup> *Id.* at 266-68; see A.J.P. TAYLOR, *THE ORIGINS OF THE SECOND WORLD WAR* 227 (1963). Chamberlain apparently thought Mussolini appropriate for the role because he spoke English, French, and German as well as Italian and had been in power as a world leader since 1922. Warshauer, *supra* note 52, at 267.

<sup>66</sup> See TELFORD TAYLOR, *MUNICH: THE PRICE OF PEACE* 3-20 (1979); Warshauer, *supra* note 52, at 268.

<sup>67</sup> Warshauer, *supra* note 52, at 268; see also TAYLOR, *supra* note 66, at 3-10.

<sup>68</sup> Lord Runciman, for example, despite being British, appears to have possessed sufficient neutrality to have been an effective mediator although whether he had the requisite skill remains open to debate. See Warshauer, *supra* note 52, at 268, 268 n.114. In any event, the

unlikely to have been resolved fairly because Hitler was unlikely to be receptive to principled negotiation or core concerns analysis.

However one characterizes Chamberlain's negotiating style, there is no disputing the result that England and the world community, out of a belief that this accommodation would avoid further similar problems and wider military conflict, tacitly gave their blessing to Germany's invasion of another country and seizure of territory.<sup>69</sup> In fact, the "deal" proved to be so bad that Chamberlain remains a mocked figure while his successor, the arguably overly bellicose Winston Churchill, is revered for standing up to Nazi aggression.<sup>70</sup> To this day, opponents of inaction or negotiation in the face of a country's aggression are often labeled "appeasers" who will only make matters worse in the long run, with Chamberlain often trotted out as the poster child of appeasement.<sup>71</sup>

Reality is, of course, more complex than caricature. Indeed, negotiated resolution is often prudence rather than appeasement, while military force or violence often creates unnecessary problems. But remembering the now infamous Sudetenland "negotiations" involving an archetypical child of darkness serves to illustrate the limits of core concerns negotiation strategies or mediation when confronting certain disputants. Sometimes someone involved in a dispute or negotiation is unreachable through the normal channels of core concern consciousness and principled negotiation.

Alternatively, one might view the essential surrender of Chamberlain and others to Hitler on the issue of the Sudetenland as resulting from recognition that core concerns negotiation would be futile, and that Hitler's opponents would need to "fish or cut bait" on the issue of whether to engage in coercion to

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recalcitrance of Hitler in my view made effective and fair mediation impossible under the circumstances.

<sup>69</sup> *Id.* at 247-48.

<sup>70</sup> *See id.* at 247 n.4 (Churchill's response to Chamberlain was that he had been "given the choice between war and dishonor. You chose dishonor and you will have war."). During World War II, Churchill's fighting-spirit-cum-bellicosity seemed appropriate. The Axis had left no alternative and much was at stake. Earlier in his career, however, Churchill's support for hostilities in Africa and Asia was arguably misplaced, leading to needless bloodshed. *See, e.g.,* E.M. FORSTER, *OUR GRAVES IN GALLIPOLI* (1922), *reprinted in* E. M. FORSTER, *ABINGER HARVEST AND ENGLAND'S PLEASANT LAND*, at 31-33 (Elizabeth Heine ed., 1996), *available at* <http://www.daclarke.org/oped/Forster.html> (ironic essay in the form of two gravestones conversing over the Crimean territorial issue, mocking Churchill as someone willing to sacrifice soldiers in the service of his political posturing). The essay's title is taken from a Churchill speech in which he suggested to the English that "our graves in Gallipoli" cry out for aggressive action against Turkey. Movie buffs might also remember the movie *Gallipoli*, which starred a pre-Mad Max Mel Gibson as part of a troop of Australian soldiers fighting in that battle, which became infamous when the soldiers were ordered to charge an enforced enemy position at great and seemingly needless loss of life.

<sup>71</sup> *See supra* notes 61-62; Russell Dean Covey, *Miranda and the Media: Tracing the Cultural Evolution of a Constitutional Revolution*, 10 *CHAP. L. REV.* 761, 781 (2007); Warshauer, *supra* note 52, at 247-49; Jason X. Hamilton, Note, "An Overview of the Legal and Security Questions Concerning Taiwanese Independence," 1 *INT'L L. REV.* 91, 101 (2003). In a particularly absurd use of the term and concept that predates Rush Limbaugh, Sean Hannity, and Glenn Beck, Senator Barry Goldwater (R-AZ) referred to a 1960 meeting between political rivals Richard Nixon and Nelson Rockefeller as the "Munich of the Republican Party" because it purportedly revealed Nixon to be selling out the conservative cause to the moderate Rockefeller wing of the Republican Party. *See* Michael Beschloss, Op-Ed., *Profiles in Courage and Cowardice*, N.Y. *TIMES*, July 23, 2000, at WK 15.

prevent his territorial expansion. Seen in this light, perhaps Chamberlain knew perfectly well that more creative problem-solving initiatives were of no avail, and simply made the wrong choice in yielding rather than confronting Hitler at that juncture.<sup>72</sup>

#### 4. *The Niebuhrian Perspective and Ordinary Dispute Resolution*

A less extreme, much more common example can also illustrate the limits of core concerns, interest-based dispute resolution. Consider run-of-the-mill tort cases such as auto accidents and similar personal injury claims arising out of mishaps involving relative strangers. Unlike Phil and Jack, the disputants in these cases have no history or relationship. Although this scenario can sometimes remove or reduce negative emotions, it also changes the dispute resolution dynamic, often restricting the possibility of creative, value-maximizing solutions. These sorts of stranger disputants are not attempting to make a deal or enjoy gains from trade. Although they have no prior relationship to cause tensions, neither do they have a prior relationship that they are seeking to preserve or one they wish to build upon for mutual benefit. Their lack of a prior relationship may also make it more difficult for them to trust one another because there is no track record of trust.

Further, these one-shot disputants also will be represented by agents who may have a different agenda for dispute resolution. For example, the plaintiff's lawyer working on contingency wants to collect fees that are usually based on a percentage of net recovery. As a result, the attorney may be unreceptive to creative, non-monetary means of resolving the matter. The defendant will be represented by counsel selected by a liability insurer that by terms of the insurance policy controls the defense and settlement of the matter. The insurer's interest will usually be minimizing aggregate settlement payments and closing files rather than exploring creative alternative settlement options.

Situations of this sort involving strangers are often quite far afield from Fischer & Ury's famous example of the disputants (two sisters in their slightly sexist example) fighting over an orange, with one wanting the pulp for juice and the other wanting the rind for baking.<sup>73</sup> If they bargain over positions and compromise by splitting the orange in half, they only each receive one half of their goal. But if they talk candidly about their interests, listen to one another, and bargain over their respective interests (why each wants an orange) rather than their respective positions (each asserting a right to the orange), they each can get all of what they want. This is the classic "win-win" situation that validates the superiority of modern dispute resolution methodology as compared to

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<sup>72</sup> I am, however, skeptical of this alternative explanation since the Chamberlain-Hitler incident took place more than a quarter-century before the explosion of modern dispute resolution scholarship. In 1938, negotiators were not armed with the intellectual tools for such self-conscious reflection on their dispute resolution methods and options or those of their opponents.

<sup>73</sup> See FISHER & URY, *supra* note 3, at 41-55. Only with trepidation do I even hint at criticism of Fisher & Ury, but nonetheless, I would have felt better if one sister were seeking the pulp in order to conduct biomedical experiments while the other sister wanted the rind for purposes of developing a new commercial seasoning product (or if the sisters had at least been doing something a little less domestic with the orange).

traditional “split-the-difference” negotiation. But it is often not the disputing situation faced by real world negotiators.

Some tort claims may actually fit this model. For example, a driver who is a physical therapist may negligently rear-end another driver, causing back pain that is capable of permanent alleviation through exercise therapy. The interest of the victim is in rehabilitation, if that is feasible. The interest of the tortfeasor lies in avoiding litigation or minimizing a damage award or higher auto insurance rates stemming from a lawsuit and settlement. Here, the victim might be better off accepting free physical therapy sessions and use of facilities from the tortfeasor in lieu of bringing suit. Similarly, in an assault-and-battery situation between neighbors coming to blows over a boundary line, the situation may be similar to Phil & Jack’s Boiler Company. The problem leading to the physical altercation may be one grounded in problems of appreciation, status, or role. If neither neighbor is too badly injured, there exists a large zone for creative reconciliation.

But in many common tort situations, the dispute may have little or nothing to do with the five core concerns. Consider a tragic auto accident in Las Vegas on April 3, 2009, a week after Professor Riskin’s Saltman Lecture. A driver was legally proceeding through an intersection. Another driver ran a red light, apparently with substantial velocity, hitting the victim’s car on the driver’s side and killing the victim.<sup>74</sup> When the victim’s survivors or estate consider their options, the five core concerns of the disputants: (1) autonomy; (2) affiliation; (3) appreciation; (4) status; and (5) role will probably have little to say about the matter. The personal representative of the estate, who has a fiduciary duty to the estate, will be hard pressed to see any goal other than maximizing compensation for this wrong. Similarly, the dependents of the decedent may need and want maximum compensation. In this case, liability of the tortfeasor would appear to be 100 percent. Thus, the only question is the value put on the decedent’s life.

Even in this type of case, however, there is more than a little room for creative core concerns negotiation or mediation by the mindful. For example, in this case, the tortfeasor was eighteen years old.<sup>75</sup> Potential plaintiffs may be more interested in a resolution that prevents the incident from ruining the life of this young tortfeasor (e.g., driver training, drug or alcohol rehabilitation if that was a factor in the collision, reduced payment or forgiveness if the tortfeasor attends and finishes college, etc.). Similarly, working on the core concerns may make it more likely that the plaintiffs will seek monetary compensation only to the limits of the tortfeasor’s auto liability insurance policy rather than garnishing her wages for decades to come.<sup>76</sup> My point is simply that tragic

<sup>74</sup> *Red-light Runner Kills Driver*, LAS VEGAS REV. J., Apr. 4, 2009, at 12B.

<sup>75</sup> *Id.*

<sup>76</sup> The decedent was identified as fifty-eight years-old, but no further information was given in the article. *See id.* Consequently, it is not unreasonable to assume that he would have worked seven to twelve more years, although it is also possible that the victim was retired or not working. Further, the victim may have had either high or low income. However, it is certainly not far-fetched to envision a sizeable damage award against the tortfeasor. The minimum amount of auto insurance required to drive in Nevada is \$15,000 per person injured and \$30,000 per accident. Nevada Dept. of Motor Vehicles, Vehicle Insurance Requirements, [www.dmvnv.com/nvreg.htm#Insurance](http://www.dmvnv.com/nvreg.htm#Insurance) (last visited Mar. 17, 2010). Conse-

torts between strangers present far fewer core concerns options than do situations like those facing Phil and Jack,<sup>77</sup> President Clinton and Speaker Gingrich,<sup>78</sup> or disputants with history and relationship.

Another real Las Vegas tort claim provides the basis of a hypothetical case presenting an even starker illustration of the type of case that is relatively immune from Fisher-Ury-Shapiro-Riskin resolution. The plaintiff was placing materials in a storage locker he rented.<sup>79</sup> The owner's dogs were (allegedly) negligently loose on the premises and attacked the plaintiff, who fled and then fell, suffering allegedly severe injuries.<sup>80</sup> A suit for premises liability followed.<sup>81</sup>

The victim has no relation with the storage facility owners other than that of anonymous customer. He claims substantial injuries exceeding his medical insurance and substantial lost past and future income, as well as the need for expensive continuing therapy and care.<sup>82</sup> In a case like this, the plaintiff will probably be relatively unconcerned about whether the defendants appreciate him, grant him better status, a larger role, or expanded autonomy. Nor is the plaintiff likely to desire any particular affiliation with the defendants or others in a related business or social community. The plaintiff wants money and medical care.

The defendants, in turn, probably will have no particular interest in social or economic affiliation with the victim (they can always rent the storage space to someone else), and there is so little relation between the parties that there is little the defendants can do in the way of appreciation, autonomy, status, and role. Certainly, an apology might in many cases go a long way toward resolving the matter,<sup>83</sup> but there are obvious limits on its ability to resolve the dispute without at least substantial payment to the victim.

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quently, a tortfeasor driver with only minimum auto liability insurance could be subject to garnished wages for some time in order to satisfy a judgment in a wrongful death case of this type.

<sup>77</sup> See Riskin, *supra* note 6, at text accompanying note 36 (relating story of Phil and Jack and their boiler company).

<sup>78</sup> See *id.* at text accompanying notes 1-8 (relating story of Clinton and Gingrich).

<sup>79</sup> See Carri Geer Thevenot, *Dog Attack Trial Begins*, LAS VEGAS REV. J., May 30, 2009, at 1B (describing case).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; Carri Geer Thevenot, *Civil Trial in Pit Bull Attack Halted*, LAS VEGAS REV. J., June 5, 2009, at 2B (noting interruption of trial for future rescheduling).

I am also familiar with this matter because I was retained by defendants in connection with a motion seeking disqualification of plaintiffs' counsel, a motion based on a lawyer in the defense firm moving to one of the plaintiff's law firms during the pendency of the case. I have no opinion regarding the merits of the substantive tort claim itself.

<sup>82</sup> Plaintiff claims injuries exceeding a million dollars and is represented by two highly regarded plaintiffs' personal injury firms. Defense is being conducted by defendants' insurers pursuant to the terms of a commercial general liability policy and the insurers have retained a nationally prominent tort defense firm and a local defense firm to represent defendants. The case is being aggressively litigated by both sides. Although this may indicate a failure of dispute resolution imagination (and mindfulness), it may also be the inevitable result of both the uncontested and disputed facts of the case, which leave little room for consideration of core concerns.

<sup>83</sup> See generally White, *supra* note 10.

And there is an additional wrinkle in the drama. Assume, after investigation, that the insurers of the defendants have come to believe that the plaintiff is both exaggerating his injuries and complaining in large part of injuries that stem not from the dog-chase-up-the-fence incident, but instead are the result of an automobile accident or other mishap that the plaintiff has thus far concealed from the defendants and the authorities (i.e., there is no police report of such an auto accident, workplace injury, slip-and-fall or physical altercation). The defendants' insurers have come to believe that the plaintiff is attempting to saddle its policyholders with the bill for injuries that are not the fault of the defendants.

Assume also that the insurers are willing to spend substantial amounts defending the matter. If a plaintiff's verdict exceeds the defendant's liability policy limits, the insurers are willing to pay the additional amount, thus removing the risk to the defendants of a judgment in excess of their insurance policy limits. In this case, a core concern of the insurers appears to be ensuring that they do not unwittingly or unnecessarily pay for injuries to plaintiff that they think were caused by something other than the dog chase incident. Conversely, assume the plaintiff denies the defendants' allegations. To plaintiff, the case is one in which the defendants' insurance company is taking an unrealistically belittling view of serious injuries suffered in the fall-from-the-fence as claimed.

Under these circumstances, the utility of core concerns negotiation or mediation will simply not be as high as in cases such as Phil and Jack or Bill and Newt. A negotiator or mediator who invested much time and energy into Fisher-Ury-Shapiro efforts at creative win-win dispute resolution may simply be wasting everyone's time. For defense counsel to expend much effort in this regard may also simply waste the insurers' money. Plaintiff's counsel has the case on a contingency fee basis. Logically, they will see almost no value in doing anything other than developing a high, but defensible benchmark for damages, and attempting to obtain it through litigation or a settlement in which the insurer pays what plaintiff wants, with some discount for the risk that defendants can prove that the injuries are overstated or stem from another cause.

In the hypothetical based on a real case, both plaintiff and defendants appear to be proceeding in good faith but with dramatically different views of the world. Because of intractable differences of perception, their dispute will resist resolution no matter how mindfully core concerns are introduced into the negotiation or mediation process. There is some potential for toning down the parties' respective negative emotions (e.g., the plaintiff feeling violated, the defendants' negative feelings after being accused of running a dangerous facility) but not much, particularly if the defendants genuinely believe that the claimed injury is fabricated.<sup>84</sup> Further, the "real" disputant in this case is an

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<sup>84</sup> Of course, to the extent that the defendants believe the claim is exaggerated or fabricated because they are under the influence of negative emotions, mindful use of core concerns principled negotiation could, at least in theory, disarm this barrier to negotiated resolution. In addition, it could be that plaintiff's negative emotions about being violated while simply going to his storage locker that could perhaps lead him to claim excessive damages, or to believe it was ethically permissible to blame the defendants for injuries he suffered elsewhere. Mindful core concerns negotiation might then move plaintiff toward a different, less

artificial entity—the insurance company—and it is not immediately clear whether this type of entity has core concerns as do natural persons.<sup>85</sup>

##### 5. *Fitting the Focus to the Fuss*

One thus frequently finds a range of situations that present disputes that may not have much to do with appreciation, affiliation, autonomy, status or role, and have much to do with fault, causation, injury, and monetary compensation. In disputes of this type, a more traditional negotiation or mediation approach may be most efficacious, regardless of whether the dispute is of historical moment or only local and individual interest. In the lawsuit involving the dog-chase and subsequent fall from the fence, for example, the best means of resolving the dispute may be the classic model of adjusting the claimed damages downward according to the risk that a jury will view them as exaggerated or stemming from an alternative cause for which the defendants are not at fault.

Because both disputes and disputants can differ widely, the mindful and effective negotiator must adjust her orientation to the situation at hand with an apt approach. Sometimes the Riskin methodology outlines for Jack-and-Phil or Bill-and-Newt will be just what the dispute resolution doctor ordered. In other instances, relentless efforts at such core concerns reconciliation may only lead to disappointment, perhaps even to mini-Munichs, in which a bad wolf/child-of-darkness disputant takes unfair advantage. To avoid this, an effective negotiator adopts an orientation apt for the matter and fits his or her “focus to the fuss.”<sup>86</sup> Borrowing Sander and Goldberg’s famous phrase, I am suggesting that within any particular dispute resolution forum or activity (e.g., negotiation, mediation), the parties and their representatives consider which approach to other parties is most apt in light of the characteristics and orientation of the other parties. For disputants like Jack and Phil, core concerns mindfulness may well pay dividends in dispute resolution. But in cases like the storage locker mishap or an auto accident, negotiators may make greater headway by focusing less on personal core concerns and more on legal entitlements, compensation calculation, and alternative modes of compensation.

The limits of core concerns analysis in many disputes hardly argue against mindfulness, but rather demand a fuller appreciation of the utility of mindfulness. A negotiator or mediator must use mindfulness, in addition to facilitating exploration of core concerns, to differentiate between those amenable to resolution and those who are unreachable. Core concerns mindfulness can be used not only to address negative feelings and work toward resolution but also to assess the disputants and their candor, motivations, and willingness to treat

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adversarial goal in resolving the claim. But, for the reasons set forth in the text, one should not be too optimistic about the prospects. A truly mindful negotiator or mediator is willing to explore options but also will recognize when the facts or disputants themselves require a different approach or the suspension of efforts.

<sup>85</sup> See *infra* Part III.C, discussing need for further research on the degree to which core concerns analysis applies to artificial persons as well as natural persons.

<sup>86</sup> Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 51 (1994) (discussing utility of matching a dispute with the most appropriate dispute resolution forum).

other parties with respect. In addition to using mindfulness to assess disputant relationships, negotiators must also use mindfulness to help them realize when further good faith negotiation is a waste of time. A negotiator's failure to recognize the incorrigible participant will ordinarily result in wasted resources or strategic gain for the "child of darkness" who refuses to negotiate in good faith or uses faux negotiation only as a tool for gaining time, leverage, or otherwise disadvantaging the good faith disputant.

In addition, mindfulness can help the negotiator realize when resolution focus should shift from core concerns and free-form interest-based bargaining to a narrower, cost-benefit analysis of likely legal and economic outcomes. For example, a disputant may fit Oliver Wendell Holmes's concept of a "bad man," who will only behave properly if forced to by law and its attendant potential for remedial coercion.<sup>87</sup> Conversely, the disputant may be acting in an adversarial manner because of concerns over appreciation, affiliation, autonomy, status, or role. The former is probably a lost cause, and pandering to him will at best be a waste of time and at worst a springboard for the bad adversary to inflict harm on others.

The other disputant is someone who may be acting counterproductively (negotiating under the influence of his or her inner "bad wolf"), but can perhaps be brought around to productive dialogue if the negotiator/mediator adequately addresses the disputant's core concerns and emotions. The expert negotiator or mediator is sufficiently mindful to distinguish between the two types of disputants and can determine whether the disputant is a bad man, only appears to be a bad man, or is only acting like a bad man because of the force of negative emotions.

As captured by Longfellow's important observation, there may be a "secret history" that explains a disputant's bad behavior as something other than simple darkness.<sup>88</sup> If the negotiator/mediator is sufficiently mindful to learn what motivates the disputant, the path toward core concerns, interest-based, consensual resolution of the dispute may yet remain open. However, where the disputant is impervious to such resolution, the negotiator disserves her client and the mediator disserves the justice system by failing to realize this and permitting the dark disputant to continue to engage in strategic activity that needlessly causes harm.

At such junctures, the better course of action for mediator and negotiator is to cut their figurative losses and cease investing/wasting resources talking to the figurative wall of the bad faith disputant. Instead, good faith dispute resolvers will need to interject into the process some appreciation of the likely range of legal outcomes that will result in the absence of negotiated resolution. I have made similar points before,<sup>89</sup> often met with criticisms from members of

<sup>87</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-61 (1897).

<sup>88</sup> See Riskin, *supra* note 6, at text accompanying note 60 (quoting Henry Wadsworth Longfellow's observation that "[i]f we could read the secret history of our enemies, we should find in each man's life sorrow and suffering enough to disarm any hostility").

<sup>89</sup> Stempel, *supra* note 1, at 248-49; Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 971 (1997).

the dispute resolution community who insist that mediation should only be “facilitative” rather than “evaluative.”<sup>90</sup>

Rather than return to that debate once more, I want to suggest that even if my critics are correct that mediation ceases to be mediation when it becomes even partially evaluative (or “eclectic” in my terminology),<sup>91</sup> and even if it is inappropriate to inject evaluation into mediation, there would be no such bar to infusing negotiation with an examination and discussion of the likely range of legal outcomes. Negotiators, be they attorneys or the disputants themselves, are under no obligation to eschew evaluation of the arguments of other disputants. Neither are negotiators required to resist at least modest evaluation and reference to the law in the face of strained arguments or unrealistic demands made by others. Unlike a mediator, who in the eyes of some (but not me) must seek resolution unmoored from the parameters of the law, no credible dispute resolution scholar would impose similar constraints upon a negotiator.

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<sup>90</sup> See Gary L. Gill-Austern, *Faithful*, 2000 J. DISP. RESOL. 343, 343 (2000) (arguing facilitation and accord is the essence of mediation); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 296-97 (2000) (disapproving of evaluation by mediator, including commentary on default legal rules); Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335, 335-36 (2000) (supporting facilitative mediation); see also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 209-12 (1994) (taking facilitative approach to mediation); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 72, 76 (1998). But see Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 511-13 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548-51 (1991) (suggesting that purely facilitative mediation fails to deal with power differentials between disputants); Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 579-81 (1995); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 49, 49 n.5, 50-51 (1996) (similar concern regarding court-annexed mediation).

There is also another argument against evaluative mediation, although it appears not to have been made in the dispute resolution literature. Just as facilitative efforts may be in vain when one party is not dealing in good faith or willing to make accommodations, evaluative mediation may also prove fruitless if one of the parties is merely going through the proverbial motions rather than trying to use the mediator's perspective to add value to the dispute resolution process. A disputant in this mode may receive spot-on evaluation of the case by a mediator but is unlikely to make use of the insight since this disputant is not really interested in actually resolving the matter through mediation—and perhaps not through negotiation until the eve of trial or while an appeal is pending.

This criticism has been, for example, made of insurance companies participating in court-order arbitration or mediation. Plaintiffs complain that the insurer attends the mediation under duress rather than out of desire to resolve the matter and may even use information gained during the process to improve its defense at trial or use the process as part of an attempt to wear down the plaintiff by elongating the dispute. See, e.g., *Campbell v. Maestro*, 996 P.2d 412, 415 (Nev. 2000) (reversing sanctions imposed on insurer for failing to participate in good faith in court-annexed arbitration process but acknowledging that such bad faith conduct can occur); *Gittings v. Hartz*, 996 P.2d 898, 902, 902 n.6 (Nev. 2000).

<sup>91</sup> See, e.g., Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COSTS LITIG. 31, 31-32 (1996).

In other words, whatever debate scholars may have over what constitutes real, apt, or good mediation,<sup>92</sup> there is widespread agreement that negotiators bargain “in the shadow of the law,” to use the popular phrase.<sup>93</sup> Although negotiators need not (and in many cases should not) allow the shadow of the law to cabin their options for resolving a dispute, the likely default resolution of the matter if litigated to conclusion forms a powerful anchoring point for evaluating the attractiveness of other resolution options. A disputant may appear to take “less” than what it would likely receive after litigation in order to gain “more” in terms of greater autonomy or appreciation or improved status, role, or affiliation. However, if interest-based negotiation relatively unmoored from legal default rules fails to produce a more attractive option, the wisest course may be using the shadow of the law as a yardstick for evaluating less perfect negotiation alternatives.

For example, disputants unable to reach a win-win outcome through mindful focus on core concerns, unpolluted by negative emotions, may rationally decide to look at the range of legal outcomes and the transaction costs attendant to pursuing full legal relief. Once these costs and benefits are relatively well calculated, the disputants may simply decide to compromise based on their respective estimates of case outcomes, preference structures (e.g., harmony, finality, greater compensation, greater publicity, the possibility of public vindication), tolerance for risk, cash flow needs, aversion to conflict, etc. In spite of the advances that have been made in making negotiation more creative, more cognizant of the core concerns, and less tethered to the law, the bulk of commercial dispute resolution today probably continues to follow this model rather than the richer Fisher-Ury-Shapiro-Riskin model.

Under these real world circumstances, it would be unwise to let emphasis on the promising potential of core concerns and mindfulness to become counterproductive forces in the context of disputes with excessively adversarial, incorrigibly unreflective disputants acting in bad faith. Those types of disputants are the wrong wolves to feed. Indeed, a dispute-resolver’s patient and extensive attempts to be mindful of the plight of bad disputants and to address their core concerns will, at best, be a waste of time and, at worst, will allow them to take advantage of others.

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<sup>92</sup> See generally Alfini, *supra* note 1; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Jean R. Sternlight, *Dispute Resolution and the Quest for Justice*, 19 EXPERIENCE 14 (2009).

<sup>93</sup> Mnookin & Kornhauser, *supra* note 3, at 997. The “shadow of the law” metaphor appears in approximately 2,319 law review articles, an amazing testimony to the illustrative power of the image and its accurate description of many negotiations. The article itself has been cited more than 850 times. Mnookin and Kornhauser made a point that now has become a common theme in law, that people usually resolve disputes without full adjudication but negotiate with an eye to the range of adjudicatory outcomes (as well as other factors such as party preference, transaction costs, attitude toward risk, and “strategic behavior”), creating a type of private ordering in which the law shapes dispute resolution behavior even though “[t]here now exists no bargaining theory than can yield accurate predictions of the expected outcomes with different legal rules, even when rational, self-interested parties are only negotiating over money issues,” with divorce even more complex because of child custody and other nonmonetary lifestyle concerns. See *id.* at 996.

Although few disputants are the equivalent of Hitler, Mussolini, Stalin, or Mao, there are more than enough bad wolves in the woods to require that the effective negotiator or mediator be vigilant. One need only turn on the television or take in a movie to see that such rogues are hard-wired into the human experience. Think Roman Grant of the HBO series “Big Love,”<sup>94</sup> advertising executive Don Draper of “Mad Men,”<sup>95</sup> or Al Swearingen of “Deadwood.”<sup>96</sup> Even though Draper may be a charismatic rogue and the post-modern audience may at some level sympathize at times with such characters (e.g., James Gandolfini as Tony Soprano in the HBO series of the same name), there seems to me no reasonable way of characterizing these personalities as persons with whom you can reach accord through greater mindfulness regarding their need for appreciation, autonomy, status, and a niche in the relevant community.

Unless art is not imitating life at all, there are probably more than a few such characters starring in real life disputes. Certainly, I have personally seen disputants that I find as self-centered and impervious to good faith negotiation as the characters discussed above. They are out for themselves in a sometimes make-your-skin-crawl manner that makes it unlikely that one can reach resolution with them that is even remotely fair—at least if one attempts too greatly to satisfy their core concerns. When faced with these types of disputants, the better path may be the more conventional route of identifying likely legal outcomes and making adjustments based on transaction costs, risk considerations, and the time value of money.

Characterizing disputants may be half (or more) of the battle. Similarly, the mindful negotiator or mediator will also recognize when the situation presented is one where autonomy, affiliation, appreciation, status, and role will have little impact when the real dispute primarily involves assessment of responsibility and amount of injury. Accordingly, this requires that negotiators

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<sup>94</sup> Big Love is an HBO television series about a modern day (and reasonably modern) polygamist (Bill Paxton) living in suburban Salt Lake City with his three wives. His primary antagonist is Roman Grant (played by a really creepy Harry Dean Stanton), head of a fundamentalist outlaw Mormon sect on a rural compound (but one within convenient driving distance of the metropolitan area to facilitate his weekly tormenting of others). Grant has more than a dozen wives (fourteen according to Wikipedia, *Roman Grant*, [http://en.wikipedia.org/wiki/Roman\\_Grant](http://en.wikipedia.org/wiki/Roman_Grant) (last visited Mar. 17, 2010)), many under the legal age for marriage, and runs the compound and its business ventures with a self-interested iron hand. He breaks the law perpetually and even commits murder. On several occasions, he has engaged in negotiations in seeming good faith only to trick and take advantage of others.

<sup>95</sup> Draper (John Hamm) is an advertising executive whose very identity is a fraud (he took a dead fellow soldier's dog tags during the Korean War and reinvented himself using the decedent's name). Draper regularly lies, engages in illicit affairs, and takes advantage of others. However, some argue that Draper's colleague Roger Sterling makes Draper look comparatively angelic. See, e.g., Timothy Egan, Op-Ed, *The Distant Mirror*, N.Y. TIMES, Aug. 16, 2009, at WK 10 (referring to Sterling as “silver-haired sybarite” while Draper is “brooding, unfathomable ad man”) (also quoting Sterling dialogue on show that “When God closes a door . . . he opens a dress,” while “more meditative Draper asks Sterling, in a Freudian ad moment, ‘What do women want?’”); Frank Rich, Op-Ed, *‘Mad Men’ Crashes Woodstock’s Birthday*, N.Y. TIMES, Aug. 16, 2009, at WK 8 (referring to the program's fictional Sterling Cooper ad agency, as reflecting “misogyny, racism and homophobia”).

<sup>96</sup> Swearingen (Ian McShane) owns much of Deadwood, including its saloon and brothel, regularly taking advantage of the other residents and visitors, inflicting physical injury or death upon some of them as may be necessary to further his ends.

be mindful of, not only the core concerns of others, but whether it will be productive to expend much effort addressing these core concerns. Although mindfulness should make us slow to consider any particular disputant as a lost cause, it should not blind us from recognizing the times when core concerns negotiation is likely to be futile. At some point, optimally flexible dispute resolution may need to yield to client-centered assessment informed by the applicable legal parameters. Fortunately, mindful attention can be a lens to understand the dark side of the other participants as well as to appreciate the core concerns that animate the attitudes of disputants acting in good faith.<sup>97</sup>

Mindfulness may also be used to make an evaluation of one's client – or for clients to evaluate their counsel. In some cases, the client will be amenable to creative solutions and seek to address his or her core concerns. In other cases, the client may place other values ahead of the core concerns, either out of personal preference or because of the dispute's context (e.g., the fender-bender between strangers that is more likely to really be only about money rather than addressing core concerns). Sometimes, one's own client may be the "bad wolf" that should not be "fed," perhaps through refusing the case, terminating the representation of the client, or refusing to let the client make a charade out of negotiation or mediation.

### III. THE RICHNESS OF THE RISKIN METHOD: ADDITIONAL ASPECTS AND AN IMPLICIT AGENDA FOR FURTHER WORK

Part II of this commentary suggested that negotiators need to be wary of feeding the wrong wolf in others through excessive expenditure of resources in the face of their intransigence. Negotiators also need to be aware of whether they are dealing with disputants who are so dominated by the bad wolf of the Cherokee tale that they have in essence become bad faith disputants or "children of darkness," who require a different, more coercive and law-based approach if negotiation is to succeed. In this Part of the commentary, I want to emphasize that despite the caveats of the preceding section, negotiation and mediation based on mindful implementation of the core concerns and interest-based dispute resolution hold great promise for maximizing outcomes. In addition, Professor Riskin effectively encapsulates these concepts, and provides a platform from which further research and reflection can refine the use of mindful core concerns dispute resolution.

Before deciding to focus on the Niebuhrian concern that mindfulness also includes an assessment of whether a dispute involves good or bad wolves, I considered additional aspects of the Riskin article, which led to a list of tentative titles associated with other possible commentary. Below, in the interests of

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<sup>97</sup> See Riskin, *supra* note 6, at text accompanying note 55 (noting that core concerns can be used as a "diagnostic 'lens' (to understand the situation and to plan, conduct, and review the negotiation) and as a 'lever' (to improve the situation, by fostering, in your counterpart and yourself, positive emotions that will make for a better interest-based negotiation)") (footnote omitted).

reflecting the wide range of possibilities opened up by Riskin's work, I briefly list some of the possible explorations of the Riskin concept.<sup>98</sup>

*A. Slowing down to Speed up: The Potential Gains of Mindfulness at the Outset*

Mindfulness may initially require what seems like a slowing of the dispute resolution process. In order to address core concerns, a negotiator or mediator needs to know more about the other disputant(s) and the history and background of the situation. This takes time. It also takes time to achieve and maintain a mindful state and to sensitively explore core concerns of disputants. General human impatience will make many negotiators and mediators reluctant to expend the extra time.

In addition, the practicalities of dispute resolution may also impede sufficient mindfulness. If a mediator is paid by the case, or if the attorney-negotiator charges something other than an hourly fee, he or she may be reluctant to spend the required additional time that reduces his effective hourly rate. If the mediator or negotiator bills by the hour, he may be reluctant to include time entries that could look to clients like padding the bill or acting inefficiently. Effective use of core concerns mindfulness may thus require mediators and negotiators to educate those who retain them. Even the pro se disputant will be tempted to cut corners in the interest of spending more time on day-to-day business and less time on resolution of a particular dispute. Again, mindfulness can help the mindful disputant or agent to realize the degree to which he or she is tempted to cut corners. However, for the mindful negotiator who is able to invest adequate time in the process, the use of Riskin's approach will likely lead to ultimately faster as well as better dispute resolution in most cases.

*B. Maximizing Mindfulness in Formal Dispute Resolution: The Role of the Lawyer*

Throughout this paper, I have referred frequently to "negotiators," assuming the term applies both to disputants representing themselves and to agent-negotiators such as corporate constituents (e.g., the regional manager trying to work out a franchise dispute) and attorneys. Lawyers have much to contribute in this area. Logically, they should be more able to achieve mindfulness than the disputants themselves, who are often so steeped in years of emotion regarding an issue that it becomes very difficult to recognize and manage negative

<sup>98</sup> I will spare readers from much discussion about some of the alternative titles for this comment that relate to my concern that mindful core concerns negotiation may prove futile or even counter-productive if the negotiator/mediator fails to appreciate when he or she is dealing with a predominately bad wolf or Niebuhrian child of darkness. Among the rejected possibilities were: *Calling out the Bullies (Softly) with Empathy*, reiterating my view that the Riskin approach can often be used even when dealing with seemingly bad disputants, although perhaps not with truly bad disputants acting in bad faith; *The Battle of the Wolves*, noting the struggle between not just good and bad within the individual but between good and bad individuals; *Law out of Mind* (with apologies to Bob Dylan), noting the danger for negotiators who fail to realize that in some situations, the shadow of the law may be used to provide effective bargaining; *Pushing the Mindfulness Frontier: Some Fault Lines*, emphasizing situations where the Riskin approach should be modified or perhaps even bypassed despite its general utility in most negotiations.

emotions in the service of better negotiation. Put another way, Jack's lawyer and Phil's lawyer are more likely to achieve mindfulness regarding a matter than Jack or Phil, both of whom have been building up negative emotions for years regarding the problems facing their boiler business. Far from being sand in the gears of mindful dispute resolution, attorneys hold the potential to be catalysts of the process.<sup>99</sup>

### C. *Mindfulness, Core Concerns, and Entity Disputants*

The notions of core concerns and negative emotions most obviously apply to disputes involving natural persons. Phil and Jack, two humans with a long-standing relationship, provide a particularly apt illustration of the manner in which human emotions springing from the core concerns can complicate negotiation. But many disputes involve artificial persons or business entities that have distinct legal identities and differ from real people in practical ways. Most obviously, the artificial entity such as a corporation or government by definition has no emotion. It also makes decisions through the stylized means of corporate boards. Thus, decision-making is regulated in a manner different than that of laws generally applicable to flesh-and-blood people. In addition, the entity is defined by a set of duties different than those arising out of general morality.<sup>100</sup> Its goals (e.g., maximize value for shareholders; build roads; interdict drugs; complete a shopping center; produce energy cheaply) often have a certain bloodless quality by design because they are often set in the abstract with consideration of impact on people only in their stylized capacity as consumers, competitors, and the like.

To be sure, entities act through constituents (e.g., officers, directors, managers, employees)<sup>101</sup> and these constituents will often be emotionally involved in the dispute. For example, in the earlier paragraph's example of a regional manager representing a franchisor in a dispute with a franchisee, it is more likely than not that the manager and the franchisee have a personal history of some friction connected to the dispute. Additionally, it is possible that emotional, interpersonal friction between the two individuals has led to the dispute. In such cases, the regional manager acting as agent for the franchisor is likely to be nearly as wrapped up in negative emotions arising out of core concerns as

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<sup>99</sup> See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1375-78 (1995) (suggesting that involvement of attorneys generally makes for more effective and efficient dispute resolution).

<sup>100</sup> Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1373 (2006).

<sup>101</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.13 (2009), reprinted in RICHARD ZITRIN ET AL., LEGAL ETHICS: RULES, STATUTES, AND COMPARISONS 55-57 (2009) (dealing with legal representation of entity clients, noting that attorney generally takes direction from the client through the constituents of the entity client); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 (2000) (addressing issues of professional responsibility in context of entity clients); see also Mashburn, *Paradox*, supra note 15, at 738-39, 777-96 (applying Niebuhr analysis in criticizing Model Rules such as Rule 1.13 for being too protective of lawyers and insufficiently protective of clients and the public).

are Jack and Phil.<sup>102</sup> Consequently, mindfulness and the core concerns methodology will, of course, be relevant to most disputes involving entities. However, it seems likely that the manner in which emotions are developed, maintained, altered, and controlled (or not controlled) will differ, at least to a degree, depending on whether a disputant is a natural person or an organization.<sup>103</sup> Niebuhr recognized that social behavior was often different than individual behavior and appears to have seen society as more problematic than the individual.<sup>104</sup> Further work in this area could well suggest modifications in the core concerns approach and a different application of mindfulness in the context of disputes involving entities.

*D. Reconciling Mindfulness and the Lawyer's Adversarial Role*

As discussed above, lawyers potentially can play a positive role as negotiators. Their influence might also be negative, particularly if an attorney is steeped in the tradition of adversarial legalism, bargaining over positions rather than interests. This can easily lead to lawyers who miss opportunities for mutual gain and who engage in bullying or other improper negotiation tactics. Just as not every lawyer is particularly good at trial or appellate advocacy, many are not effective in addressing core concerns. Some of this can result from the same problems that impact lay negotiators: misunderstanding or poor social skills.<sup>105</sup> But it can also result from a lawyer's misperceptions regarding effective negotiation. A lawyer's peers may consider him a good negotiator in matters where he engages in positional bargaining within the shadow of the law, but he may be a totally ineffective negotiator where the goal is mutual gain by avoiding the strictures of the law.

Of course, to be effective core concerns negotiators, lawyers will need training in interest-based negotiation and the core concerns, or to at least have their consciousness raised to appreciate the degree to which these principles can achieve better negotiation outcomes. Professor Riskin's analysis convincingly argues that lawyers will also need to be more mindful, or perhaps even have formal training in mindfulness. Dispute resolution has been a significant part of the law school curriculum for approximately three decades and progress has clearly been made in better training lawyers for the dispute resolution task.<sup>106</sup> But much more remains to be done.

Although a key part of the curriculum, dispute resolution as a genre remains outside the traditional first-year law students' schedule (e.g., Contracts, Torts, Property, Civil Procedure, Criminal Law, Criminal Procedure, Constitu-

<sup>102</sup> By contrast, a lawyer brought in to negotiate on behalf of the company is more likely to achieve the level of engaged detachment recommended by Riskin.

<sup>103</sup> Galanter, *supra* note 100, at 1373 (discussing degree to which artificial person actors and disputants behave differently than natural persons).

<sup>104</sup> See NIEBUHR, *supra* note 22, at Ch. 2; NIEBUHR, MAN'S NATURE AND HIS COMMUNITIES, *supra* note 16, at 84 (noting "Man's Tribalism as One Source of His Inhumanity"); NIEBUHR, MORAL MAN AND IMMORAL SOCIETY, *supra* note 16, at 257-77 (arguing that people allow individual moral inclinations to be subjugated by group decision-making).

<sup>105</sup> See Riskin, *supra* note 6, at text accompanying note 70.

<sup>106</sup> Casebooks for dispute resolution courses have publication dates dating back to the 1980s. See, e.g., LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1st ed. 1987).

tional Law),<sup>107</sup> list of courses required for graduation (e.g., Professional Responsibility), or near-requirement courses taken by most students because of their wide utility (e.g., Evidence, Corporations, Sales) or presence on the bar exam (e.g., Trusts & Estates, Community Property, Secured Transactions, Commercial Paper). Despite their popularity, ADR courses are usually not required, although many law schools require an ADR exercise of some sort as part of the curriculum.<sup>108</sup> In addition, the modern Lawyering Process or Legal Research and Writing course offered in law school, unlike its ancestors prior to 1980, often involves considerations of negotiation and dispute resolution.<sup>109</sup>

Despite these improvements, there remain students who move through law school without sufficient grounding in the type of dispute resolution considerations and methods championed by Professor Riskin. Many law graduates with such exposure will quickly find it diluted by a real world lawyering culture still steeped in over-adversarialism, position-based bargaining, and pressures to act too quickly or posture too much in response to client pressures. The dispute resolution initiatives of the past three decades have done much to improve the situation, but business pressures, a burgeoning bar, and a reduced sense of community have impeded progress by removing some of the natural incentives for sound negotiating that implicitly grasped the importance of mindfulness and core concerns.<sup>110</sup> Improvements in negotiation training in law school and expanded CLE (continuing legal education) opportunities can only do so much if the real world of practice continues to overvalue adversarialism and per-

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<sup>107</sup> There are exceptions, of course. For example, the Boyd School of Law first-year curriculum requires that students take “Civil Procedure/ADR” and allocates six credits to the course, which is significant in that many law schools require only four or five credit hours of civil procedure. However, civil procedure is a broad and complex topic, one often considered the most difficult of the first-year courses. As a result, the combined civil procedure/ADR course can often become simply a more extensive civil procedure course with only a dollop of dispute resolution.

<sup>108</sup> For example, a large percentage of the Boyd School of Law student body participates in an in-house client counseling competition or negotiation competition, with these and other dispute resolution skills emphasized in the Law School’s Lawyering Process curriculum. In addition, the basic Civil Procedure class at Boyd (six credits extending over two semesters) includes dispute resolution, albeit only as a small percentage of course coverage.

<sup>109</sup> See, e.g., STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 281-370 (3d ed. 2007).

<sup>110</sup> The importance of community in the bar has probably been underestimated. The 1983-93 period was the heyday of Rule 11 sanctions, a time of increased motions for sanctions (which implicitly accused an opponent of making a claim or defense that was not “well-grounded in fact” or “supported by existing law” or a reasonable law reform argument). Further examination revealed that Rule 11 motions were much more common in large urban centers and quite rare in smaller legal communities. See STEPHEN BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989). Most observers attribute this to lawyers in larger cities being unlikely to encounter each other with sufficient frequency to build community. “Bomb throwing” by accusing others of filing frivolous claims was facilitated because opposing lawyers were comparative strangers and there was little likely subsequent cost to attacking opposing counsel in the instant case. By contrast, lawyers in smaller communities knew that they would meet again, often with circumstances reversed, and showed corresponding restraint. Geogene Vairo, *Rule 11 and the Profession*, 67 *FORDHAM L. REV.* 589, 627 (1998).

ceived “toughness” above mindfulness and interest-based negotiation that may be viewed as too “touchy-feely” by senior lawyers and important clients. Further thoughts from Professor Riskin and others on improving the situation remain welcome.<sup>111</sup>

*E. Ethics, Incentives, and Mindfulness*

As discussed above, compensation schemes may impede appropriate approaches to dispute resolution, diminishing interest in mindfulness and exploration of the core concerns. Lawyers billing by the hour may have insufficient dedication to assisting disputants in resolving a matter without litigation, although they should logically be willing to invest a significant number of presumably remunerative hours in learning about and applying mindfulness, core concerns, and other modern dispute resolution strategies. Lawyers working on contingency presumably are happy to forego trial if settlement produces a high enough payment to provide adequate compensation. However, in smaller stakes cases, there is the danger of the plaintiff’s contingency “mill” that simply tries to settle cases quickly according to a standard formula (e.g., settlement value equals special damages multiplied by three) rather than according to client interests, desires, or needs.<sup>112</sup> Contingency lawyers may be further compromised by lacking incentive to explore means of dispute resolution that do not produce a lump sum payment from which they can extract a fee based on a lump sum (or periodic payments) recovery. Further study may provide suggestions for reducing this barrier to better negotiation and for making lawyers more mindful of the manner in which their own economic incentives may impede their utility to clients in negotiation.

*F. “A Sense of Where You Are”: Situation Sense and Dispute Resolution*

As the joke goes: “How do I get to Carnegie Hall? Practice.”<sup>113</sup> Better negotiation requires the acquisition of negotiation expertise. Better use of mindfulness and the core concerns requires more experience with them. This point has recently made significant headlines due to Malcolm Gladwell’s well-received book, *Outliers*, in which he discusses the “Ten Thousand Hour Rule,” the notion that one becomes only truly expert in a skill after he or she has invested approximately 10,000 hours of sustained practice.<sup>114</sup> Although the idea of a requisite amount of training time seems relatively new, observers have long known that what distinguishes the merely adequate participant from a true

<sup>111</sup> However, once again, progress must be acknowledged. For example, Professor Riskin’s Saltman Lecture given in Las Vegas on March 27, 2009 was also simultaneously available to members of the ABA Section on Dispute Resolution, many of whom participated by phone, listening to the talk, and participating in the discussion that followed.

<sup>112</sup> See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1606 (2004).

<sup>113</sup> Riskin, *supra* note 6, at text accompanying note 186 (using a joke to illustrate the need to practice and gain experience with mindfulness techniques, suggesting that simple awareness of the mindfulness concept and techniques is insufficient).

<sup>114</sup> See MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 35-50 (2008) (“The 10,000 Hour Rule: ‘In Hamburg, we had to play for eight hours,’” using the example of The Beatles who, prior to achieving international fame in 1964, spent countless evenings performing live in clubs, most notably in Hamburg, Germany during 1960-62).

expert is the degree to which the expert has a “feel” for the enterprise. In master chess players, this has been referred to as “situation sense.”<sup>115</sup>

The career of former basketball star, and later U.S. Senator, Bill Bradley (D-N.J.) introduced the concept of situation sense to the lay audience, in which he described expert basketball players as having at all times a “sense” of where they were on the court and their position in relation to teammates and opponents.<sup>116</sup> Hockey great Wayne Gretzky expressed a similar concept when he described part of the secret to his success as that he did not go to “where the puck has been” but instead sought to be “where the puck is going to be.”<sup>117</sup>

The common thread in these descriptions of high professionalism and expertise is the notion that the standouts in their respective fields recognize situations and respond almost instinctively in an effective manner. Negotiators fit this profile when they can quickly assess a dispute not only on the merits but also in terms of the core concerns and emotions of the participants. Although there is perhaps no substitute for experience, mindfulness surely can help and at some point becomes part of the experience brought to a matter by seasoned negotiators or mediators. Part of the ongoing examination of the Riskin methodology should logically include efforts to determine how best to acquire such expertise in a reasonably short time, hopefully something less than the 10,000 hours posited by Gladwell.

#### IV. CONCLUSION

Even for those not steeped in meditation techniques or formal training in mindfulness, Professor Riskin’s construct for approaching negotiation and mediation provides a powerful template for achieving better dispute resolution outcomes. At its core, the Riskin method is one that emphasizes perspective, calm, openness, and flexibility in what I would call an “engaged detachment” in which the negotiator/mediator is aware of the situation, but not overcome by the emotions generated by the dispute or those it affects. Keeping a clear head that recognizes and appreciates emotions rather than suppressing them or pretending they do not exist provides a better approach to negotiation and facilitates an examination of the actual interests of the disputants. Reaching an accommodation that maximizes the respective interests and core concerns of appreciation, affiliation, autonomy, status, and role is more likely to occur if the participants (parties, counsel, intermediaries, even witnesses) are more mindful.

<sup>115</sup> See Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1284-89 (1999).

<sup>116</sup> See JOHN MCPHEE, *A SENSE OF WHERE YOU ARE: BILL BRADLEY AT PRINCETON*, at Introduction (3d ed. 1999). Bradley was considered by many to be the nation’s top college basketball player when he starred at Princeton during the early 1960s, leading his team to a Final Four berth in 1964. He subsequently played for the New York Knicks and was part of 1969 and 1973 NBA championship teams. Elected to the U.S. Senate in 1978, he served three terms and ran unsuccessfully for his party’s presidential nomination in 2000, a nomination captured by Vice-President Al Gore.

<sup>117</sup> Neil Hohlfeld, *IHL Seeking Quicker Games*, HOUSTON CHRON., Dec. 9, 1997, at 9 (presenting Gretzky quote as, “I skate to where the puck is going to be, not to where it has been”).

Self-conscious effort to be more mindful will benefit the process, even in the absence of formal training.

But mindfulness also connotes the ability to recognize (without being overcome or clouded by emotion) when one or more of the interested parties is insufficiently willing to negotiate in good faith. When faced with these sort of Niebuhrian “disputants of darkness,” the mindful negotiator or mediator will need to know when to cut everyone’s respective losses and move toward a more rights-based method of dispute resolution, where the “shadow of the law” forces the bad faith disputant to face enough of the legal inevitable to come to an enforceable agreement. Similarly, the mindful negotiator must recognize this early enough and effectively enough to prevent the bad faith disputant from taking unfair advantage of those acting in good faith.

Effective dispute resolution not only requires feeding the right internal wolf, but applying the same approach to the external good and bad wolves encountered in a world with more than its share of bad faith disputants. If Reinhold Niebuhr had been a negotiator or mediator, he surely would have appreciated the problem and dealt with it pragmatically.<sup>118</sup> Just as democracy was for Niebuhr “a method of finding proximate solutions for insoluble problems,”<sup>119</sup> dispute resolution must be a means of finding adequate resolution that recognizes that some disputants and situations will be too resistant to informal resolution, thus requiring that prudent negotiators and mediators know when to utilize different techniques or shift resources elsewhere.

In seeking dispute resolution, the effective Niebuhrian negotiator or mediator would presumably remain mindful of both the limits as well as the potential of the disputants, including the significant possibility that certain disputants are lost causes, at least if the resolution of the matter is to be sufficiently fair and prompt. Niebuhr states that:

[t]he children of light must be armed with the wisdom of the children of darkness but remain free from their malice. They must know the power of self-interest in human society without giving it moral justification. They must have this wisdom in order that they may beguile, deflect, harness and restrain self-interest, individual and collective, for the sake of the community.<sup>120</sup>

Ironically, Niebuhr’s perhaps most widely quoted work is one not found in his books and not generally associated with him. Niebuhr appears to be the author of the now famous “serenity prayer” that has become a fixed part of the American canon:

God, give us grace to accept with serenity the things that cannot be changed, courage to change the things that should be changed, and the wisdom to distinguish the one from the other.<sup>121</sup>

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<sup>118</sup> See Mashburn, *Paradox*, *supra* note 15, at 773 (describing Niebuhr as one who took “pragmatic approach” to society and politics); *see also id.* at 775-78 (for Niebuhr “society will always be a ‘jungle,’ requiring prudence and pragmatism to navigate”) (taking quoted term from NIEBUHR, *MORAL MAN*, *supra* note 16, at 81).

<sup>119</sup> NIEBUHR, *supra* note 22, at 118.

<sup>120</sup> *Id.* at 41.

<sup>121</sup> ELISABETH SIFTON, *THE SERENITY PRAYER: FAITH AND POLITICS IN TIMES OF PEACE AND WAR* 7 (2003) (Sifton is Niebuhr’s daughter and discusses origin of the prayer, which family states first emerged in 1943 sermon); *see also* *THE ESSENTIAL REINHOLD NIEBUHR: SELECTED ESSAYS AND ADDRESSES* 251 (Robert McAfee Brown ed. 1986) (reproducing the

Negotiators and mediators would do well to embrace this credo in their mindful pursuit to understand and utilize core concerns in the service of dispute resolution.

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prayer); Serenity Prayer, [http://en.wikipedia.org/wiki/Serenity\\_Prayer](http://en.wikipedia.org/wiki/Serenity_Prayer) (last visited Mar. 17, 2010) (describing the prayer, which may have been used by Niebuhr as early as 1934 and noting the popularity of the prayer and its embrace by Alcoholic Anonymous, which frequently uses the prayer to begin group sessions; also noting that although Niebuhr claimed authorship, he acknowledged that the prayer may have been orally transmitted over the centuries and noting considerable authority that the prayer predated Niebuhr's famous use of it). Additional recent scholarship appears to have solidified the case that Niebuhr is the author of the famous prayer and that it may have emerged in 1937 rather than 1943 as his family maintains. See Laurie Goodstein, *Serenity Prayer Skeptic Now Credits Niebuhr*, N.Y. TIMES, Nov. 28, 2009, at A1 ("A Yale librarian who cast doubt last year on the origins of the Serenity Prayer . . . says new evidence has persuaded him to retain the famed Protestant theologian Reinhold Niebuhr as the author of the next edition of the Yale Book of Quotations.").

The Serenity Prayer, which is often expressed in slightly different wording, makes occasional forays into judicial decisions and legal scholarship. See, e.g., *In re Long*, Nos. 10-07-00084-CR, 10-07-00165-CV, 10-07-00166-CR, 2007 WL 2051993, at \*2 (Tex. Ct. App. July 18, 2007) (Gray, C.J., dissenting) (beginning dissent with serenity prayer); *O'Connor v. State*, 835 So. 2d 1226, 1228 n.1 (Fla. Dist. Ct. App. 2003) (quoting serenity prayer and giving background); Peter J. Boettke et al., *High Priests and Lowly Philosophers: The Battle for the Soul of Economics*, 56 CASE W. RES. L. REV. 551, 551 (2006) (beginning article with reprint of Serenity Prayer); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 666 (1994) (quoting Niebuhr's view that law is a "compromise between moral ideals and practical possibilities" (citing NIEBUHR, THE NATURE AND DESTINY OF MAN, *supra* note 16, at 302)).

The Serenity Prayer is often set forth in slightly different versions. For example, in KURT VONNEGUT, *SLAUGHTERHOUSE FIVE* 58, 185 (1969), the Prayer is set forth as "God grant me the serenity to accept the things I cannot change, courage to change the things I can, and wisdom always to tell the difference." Similar versions have appeared in more recent popular works by self-help gurus like Dr. Phil, Steven Covey, Pastor Rick Warren, and by celebrities such as Michael J. Fox, Wynonna Judd, and Paula Deen. In almost none of these works is the Prayer attributed to Niebuhr, perhaps another indication of the Niebuhr's unfortunate fade from modern view. See, e.g., PHILLIP C. MCGRAW, *REAL LIFE: PREPARING FOR THE 7 MOST CHALLENGING DAYS OF YOUR LIFE* 33 (2008); PAULA DEEN WITH SHERRY SUIB COHEN, *IT AIN'T ALL ABOUT THE COOKIN'* 65 (2007); RICK WARREN, *GOD'S POWER TO CHANGE YOUR LIFE* 98 (2006); WYNONNA JUDD WITH PATSI BALE COX, *COMING HOME TO MYSELF* 260 (2005); STEPHEN R. COVEY, *THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS* 135 (2004); MICHAEL J. FOX, *LUCKY MAN: A MEMOIR* 211 (2002).